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Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

TERRY CAMPBELL,

Petitioner,

v.

STATE OF LOUISIANA

Respondent.

On Petition For a Writ of Certiorari
To the Louisiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a white defendant has standing to object to the race-based exclusion of grand jury foremen on Equal Protection grounds even if not of the same race as the excluded grand jury foremen?

2. Whether a white defendant has standing to raise the due process claim that the former and current foremen of the grand jury which handed down his indictment had been selected in a pattern demonstrating racial discrimination against blacks in violation of defendant's rights under the Fifth and Fourteenth Amendments to the United States Constitution?

3. Whether a white defendant has standing to raise the fair cross-section claim that the former and current foremen of the grand jury which handed down his indictment had been selected in a pattern demonstrating racial discrimination against blacks in violation of defendant's rights under Fifth, Sixth, and Fourteenth Amendments to the United States Constitution?

LIST OF PARTIES

Terry Campbell is the Petitioner. He appears herein through retained counsel, Richard V. Burnes, 711 Washington Street, Alexandria, Louisiana 71301-8030, (318) 442-4300.

Respondent is the State of Louisiana through Attorney General Richard P. Ieyoub, 301 Main Street, Sixth Floor, One American Place, Baton Rouge, Louisiana, 70801, (504) 342-7013, District Attorney J. William Pucheu, Courthouse, 200 Courthouse Street, Ville Platte, Louisiana 70586, (318) 627-3205, and Assistant District Attorney Richard W. Vidrine, 131 Court Street, Ville Platte, Louisiana 70586, (318) 363-1171.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS, JUDGMENTS, AND ORDERS BELOW

The unpublished judgment rendered by the Louisiana Supreme Court is included in the appendix to this petition, beginning at page A-1. The published opinion of the Louisiana Supreme Court is reported at *State v. Campbell*, 95-0824 (La. 10/2/95); 661 So.2d 1321, and is included in the appendix to this petition, beginning at page A-3. The published denial of rehearing by the Louisiana Supreme Court is reported at *State v. Campbell*, 95-0824 (La. 11/3/95); 661 So.2d 1374, and is included in the appendix to this petition beginning at page F-1. The published opinion of the Louisiana Court of Appeal, Third Circuit, is reported at *State v. Campbell*, 94-1140 (La.App. 3 Cir. 3/1/95); 651 So.2d 412, and is included in the appendix to this petition beginning at page B-1. The unpublished transcript of the denial ~~of~~ defendant's Motion for New Trial in the Thirteenth Judicial District Court, Parish of Evangeline, Number 45,690-F, is included in the appendix beginning at page C-1. The unpublished Judgment denying defendant's Motion to Quash Grand Jury Indictment in the Thirteenth Judicial District Court, Parish of Evangeline, Number 45,690-F, is included in the appendix beginning at page D-1. The unpublished transcript of the hearing on Defendant's Motion to Quash Grand Jury Indictment in the Thirteenth Judicial District Court, Parish of Evangeline, Number 45,690-F, is included in the appendix beginning at page E-1.

JURISDICTION

The Louisiana Supreme Court rendered the judgment sought to be reviewed on October 2, 1995. The Louisiana Supreme Court denied defendant's timely application for rehearing in an order dated November 3, 1995. 28 U.S.C. § 1257 confers on this Court jurisdiction to review on writ of certiorari the judgment of the Louisiana Supreme Court. Louisiana Attorney General Richard P. Ieyoub has been notified and served a copy of this Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be . . . deprived of . . . liberty, . . . without due process of law; . . . .

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

The Fourteenth Amendment to the Constitution of the United

> which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . .

28 U.S.C. § 1257 provides, in pertinent part:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right privilege, or immunity is specially set up or claimed under the constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Louisiana Code of Criminal Procedure, Article 413, provides:

> A. The grand jury shall consist of twelve persons plus a first and second alternate for a total of fourteen persons qualified to serve as jurors, selected or drawn from the grand jury venire.
>
> B. In parishes other than Orleans, the court shall select one person from the grand jury venire to serve as foreman of the grand

jury. The sheriff shall draw indiscriminately and by lot from the envelope containing the remaining names to complete the grand jury. The envelope containing the remaining names shall be replaced into the grand jury box for use in filling vacancies as provided in Article 415.

C. In the parish of Orleans, the court shall select twelve persons plus a first and second alternate for a total of fourteen persons from the grand jury venire, who shall constitute the grand jury. The court shall thereupon select one of the jurors to serve as foreman.

D. The first and second alternates shall receive the charge as provided in Article 432 but shall not be sworn nor become members of the grand jury except as provided in Article 415.

STATEMENT OF THE CASE

The Louisiana Supreme Court has decided important questions of federal law that have not been, but should be, settled by this Court. The decisions by the Louisiana Supreme Court conflict with the relevant decisions of this Court in *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), and in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). Additionally, the decisions by the Louisiana Supreme Court conflict with the decisions of the United States Court of Appeals, Eleventh Circuit, in *Bowen v. Kemp*, 769 F.2d 672 (11th Cir. 1985), and in *United States v. Sneed*, 729 F.2d 1333 (11th Cir. 1984). Further, the United States Court of Appeals, Fifth Circuit, has entered a decision in *United States v. Cronn*, 717 F.2d 164 (5th Cir. 1983)

which conflicts with the decisions of United States Court of Appeals, Eleventh Circuit, in ***Bowen*** and ***Sneed***.

From the beginning, defendant, Terry Campbell, a white man, has objected that the indictment charging him was constitutionally defective. Defendant asserted that the grand jury foreman selection process as applied in Evangeline Parish excluded blacks and was discriminatory and violated the equal protection clause and also violated defendant's due process and fair cross-section rights. It is uncontested by the state and acknowledged by the trial judge that the prior thirty-five grand jury foremen selected over a sixteen and a half year period had all been white.

The trial court denied defendant's Motion to Quash Grand Jury Indictment holding that defendant had no standing to raise race-based constitutional claims because defendant is white. On appeal, the Louisiana Court of Appeal, Third Circuit, rendered a judgment overturning the trial court's ruling that defendant had no standing to raise race-based constitutional claims. The Louisiana Court of Appeal remanded the case with instructions to have a hearing and make a determination whether the grand jury foreman selection process in Evangeline Parish violated defendant's constitutional rights. The Louisiana Supreme Court granted the state's writ and reversed the decision of the Louisiana Court of Appeal, Third Circuit, holding that a white defendant had no standing to raise race-based constitutional claims.

The very narrow questions presented to this Court are whether a white criminal defendant has standing to raise equal protection claims and due process/fair-cross-section claims when blacks are excluded from selection as grand jury foremen thereby tainting the entire grand jury.

I. Background

Defendant, Terry Campbell, suffered a head injury on August 6, 1986, resulting in the destruction and surgical removal of portions of his brain. Early on Saturday morning, January 11, 1992, in the Evangeline Parish community of Pine Prairie, James L. Sharp was shot and killed. Defendant was arrested at Cypress Mental Hospital in Lafayette, Louisiana on January 11, 1992. An indictment alleging one count of second degree murder was returned against defendant.

A hearing was held on December 2, 1993, on defendant's Motion to Quash Grand Jury Indictment in the Thirteenth Judicial District Court before the Honorable Preston M. Aucoin, District Judge. Said motion and hearing raised the issues of constitutional defects in the indictment relating to the grand jury foreman selection process as applied in Evangeline Parish. Defendant's motion to quash was denied. Trial on the merits began on December 6, 1993, and ended in mistrial on January 12, 1994. Re-trial began on May 9, 1994. The jury returned a verdict of guilty of second degree murder against defendant on May 12, 1994. Prior to sentencing, defendant timely filed a Motion for New Trial wherein defendant again raised the issue of his indictment which was handed down by an unconstitutionally constituted grand jury. The motion for new trial was denied.

Defendant appealed his conviction to the Louisiana Court of Appeal, Third Circuit, which by a Judgment and Opinion dated March 1, 1995, remanded the case with instructions to the Thirteenth Judicial District Court for a hearing to determine whether the grand jury foreman selection process in Evangeline Parish violated defendant's constitutional rights. The state filed an Application for Writ

of Certiorari or Review to the Court of Appeal, Third Circuit with the Louisiana Supreme Court. The Louisiana Supreme Court granted the state's writ on October 2, 1995, and reversed the judgment of the Louisiana Court of Appeal, Third Circuit, and remanded the case to the Louisiana Court of Appeal, Third Circuit, for treatment of defendant's remaining assignments of error.

II. Prior Rulings

At the hearing on defendant's Motion to Quash Grand Jury Indictment held on December 2, 1993, in the Thirteenth Judicial District Court, defendant argued both his equal protection claim and his due process/fair cross-section claim. The transcript of the hearing is included in the appendix to this petition, beginning at page E-1. In the judgment rendered on December 2, 1993, and signed on December 6, 1993, the Honorable Preston N. Aucoin denied defendant's motion to quash. The judgment is included in the appendix to this petition, beginning at page D-1. The trial Judge held that defendant had no standing to raise race-based constitutional claims because defendant is white. In ruling, the trial Judge stated:

> The court holds that in the case sub judice there is no racial discrimination in the process used in Evangeline Parish, Louisiana against the Defendant, Campbell. Again I am restricting all of my comments to this one particular case that we're here on this morning.
>
> This Court rules that the Defendant, Campbell, being a white man accused of killing another white man, Mr. Sharp, was not denied equal protection of the laws and/or due

> process because of the grand jury foreperson selection process in the past up to the present, where all of the foreperson were white. Therefore, Defendant, Campbell, has no standing to raise that issue. That being the case the court need not consider other issues. The Motion to Quash the indictment is denied.

See the appendix to this petition at page E-37.

The defendant contemporaneously objected to the trial Judge's ruling. See the appendix to this petition at page E-38.

Trial on the merits began on December 6, 1993, and ended in mistrial on January 12, 1994. Re-trial began on May 9, 1994. The jury returned a verdict of guilty of second degree murder against defendant on May 12, 1994.

Prior to sentencing, defendant timely filed a Motion for New Trial wherein defendant again raised the issue of his indictment which was returned by an unconstitutionally constituted grand jury. The Motion for New Trial is included int he appendix to this petition, beginning at page H-1. The motion was denied. The transcript of the denial of the motion for new trial is included in the appendix to this petition, beginning at page C-1.

Defendant, in his appeal to the Louisiana Court of Appeal, Third Circuit, urged eleven assignments of error. The Assignment of Error filed by the defendant in his appeal is included in the appendix to this petition, beginning at page G-1. Assignment of error number one asserted that:

> [t]he trial court erred in overruling the Motion to Quash Grand Jury Indictment because

> Defendant was charged with a grand jury indictment which was returned by a grand jury which was illegally and unconstitutionally selected and that the grand jury foreperson selection process in Evangeline Parish was discriminatory and in violation of Louisiana and United States Constitutional Provisions.

In defendant's brief and at oral argument, defendant raised both his equal protection and due process/fair cross-section claims.

The state neither filed a brief in the appeal nor appeared for oral argument.

The Louisiana Court of Appeal, Third Circuit, rendered a judgment dated March 1, 1995, overturning the trial court's ruling that defendant had no standing to raise race-based constitutional claims because defendant was white. The opinion of the Louisiana Court of Appeal, Third Circuit, is included in the appendix to this petition, beginning at page B-1. The Court of Appeal remanded the case to the Thirteenth Judicial District Court with instructions to have a hearing and make a determination whether the grand jury foreman selection process in Evangeline Parish violated defendant's constitutional rights.

The state prepared and filed an Application for Writ of Certiorari or Review to the Court of Appeal, Third Circuit with the Louisiana Supreme Court. The defendant prepared and filed an Opposition to Application for Writ of Certiorari or Review. The Louisiana Supreme Court granted the state's writ and reversed the decision of the Louisiana Court of Appeal, Third Circuit. The judgment rendered by the Louisiana Supreme Court is included in the appendix to this

petition, beginning at page A-1. The Louisiana Supreme Court held in its opinion that a white defendant had no standing to raise race-based constitutional claims:

> Under *Rose*, defendant does not have standing to bring an equal protection claim challenging the exclusion of blacks from serving as grand jury foremen as he is not one of the same race or "identifiable group" as those he alleges were excluded from serving as foremen. Under *Hobby* defendant does not have standing to bring a due process claim challenging discrimination against blacks in the selection of grand jury foremen, as in that case, the Supreme Court held that the "ministerial role of the office of federal grand jury foreman is not such a vital one that if discrimination in the appointment of an individual to that post significantly invades the distinctive interest of the defendant protected by the Due Process Clause." *Hobby*, 468 U.S. at 346, 104 S.Ct. at 3097. The role of the grand jury foreman in Louisiana appears to be similarly ministerial. . . . Therefore, as is *Hobby*, discrimination in the selection of a grand jury foreman from a properly constituted venire has little, if any, effect on the defendant's due process right of fundamental fairness.

See the appendix to this petition at page A-9.

Defendant, Terry Campbell, is on direct appeal and has raised the issues of discrimination in the grand jury foreman selection process at all stages starting with a pre-trial Motion to Quash Grand Jury Indictment, and by raising the

issue in a timely Motion for New Trial, and by urging an assignment of error in his appeal to the Louisiana Court of Appeal, Third Circuit, and in his reply to the state's application for writ to the Louisiana Supreme Court. Defendant has at all times preserved this issue.

REASONS FOR GRANTING CERTIORARI

This case involves constitutional issues of substantial importance to criminal jurisprudence which this Court has not addressed and which the Louisiana Supreme Court has decided in a way that conflicts with relevant decisions of this Court. In *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), this Court held that a black criminal defendant is deprived of his due process and equal protection rights when there was a systemic exclusion of blacks from the grand jury that indicted him and the petit jury that convicted him. And in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), this Court held that under the equal protection clause, a criminal defendant may object to race-based exclusions of petit jurors through preemptory challenges whether or not the defendant and the excluded jurors share the same race.

Further, the decision by the Louisiana Supreme Court directly conflicts with the decisions entered by the United States Court of Appeals, Eleventh Circuit. And finally, there is a split in the circuits on this issue. The United States Court of Appeals, Fifth Circuit, has entered a decision which directly conflicts with the decisions entered by the Eleventh Circuit.

I. Constitutional Claims Raised by Defendant

Defendant, prior to the trial on the merits in his case,

filed a Motion to Quash Grand Jury Indictment wherein he objected that the indictment against him was constitutionally defective in that the manner of selection of grand jury foremen was illegal. More specifically, defendant asserted that the grand jury foreman selection process as applied in Evangeline Parish excluded blacks and was discriminatory and violated the equal protection clauses of both the United States Constitution and the Louisiana Constitution. Additionally, defendant argued that the grand jury foreman selection process violated his due process and fair cross-section rights guaranteed by the United States Constitution and the Louisiana Constitution.

For a period from January of 1976 through August of 1993, thirty-five (35) white grand jury forepersons had been selected in Evangeline Parish where approximately twenty-three percent of the registered voters were black. Defendant's evidence covered a sixteen and a half year period. In *Guice v. Fortenberry*, 722 F.2d 276, 280 (5th Cir. 1984), and *Johnson v. Puckett*, 929 F.2d 1067, 1072 (5th Cir. 1991), the period of time that the United States Court of Appeals, Fifth Circuit, found relevant was fifteen years.

At the hearing held on December 2, 1993, defendant introduced evidence establishing proportions of blacks in Evangeline Parish for the sixteen and half year period. Defendant's population statistics were taken from the registered voter lists of Evangeline Parish for 1976 through 1993. Defendant's data is summarized as follows:

REGISTERED VOTER BREAKDOWN FOR EVANGELINE PARISH FOR 1976 TO 1993

Date	Total	White	Black	Blacks as a % of Total
3/31/76	20,059	15,749	4,310	21.49
3/31/77	20,309	15,958	4,351	21.42
3/31/78	19,671	15,455	4,216	21.43
3/31/79	20,097	15,732	4,365	21.72
3/31/80	21,818	17,093	4,725	21.66
3/31/81	21,592	16,907	4,685	21.70
3/31/82	20,938	16,347	4,561	21.93
3/31/83	21,499	16,722	4,777	22.22
3/31/84	22,266	17,139	5,124	23.01
3/31/85	21,446	16,391	5,048	23.54
3/31/86	21,123	16,120	5,003	23.69
3/31/87	21,726	16,501	5,220	24.03
3/24/88	21,542	16,287	5,251	24.38
4/01/89	21,192	15,882	5,300	25.01
3/09/90	21,274	15,888	5,376	25.27
2/15/91	21,963	16,469	5,480	24.95
3/31/92	21,817	16,270	5,532	25.54
2/12/93	21,920	16,390	5,511	25.51

Defendant established that during that sixteen and a half year period, no black person had ever been selected as a grand jury foreman. It was uncontested at the December 2, 1993, hearing and in all subsequent proceedings that the prior thirty-five grand jury foremen over a sixteen and a half year period had all been white. This fact was admitted not only by the state but also acknowledged by the trial judge. The fact that zero grand jury foreman were black is compelling. "While 'statistics are not, of course, the whole answer, ... nothing is as emphatic as zero.'" *Johnson v. Puckett*, 929

F.2d 1067, 1073 (5th Cir. 1991)(quoting *Guice v. Fortenberry*, 661 F.2d 496, 505 (5th cir. 1981)(en banc), quoting *United States v. Hinds County School Board*, 417 F.2d 852, 858 (5th Cir. 1969)). The chances of randomly picking a white person thirty-five consecutive times is less than one in ten thousand.

A. Equal Protection Claim

The United States Supreme Court initially set out a three step test to determine whether a defendant establishes a *prima facie* case of discrimination in an equal protection claim in *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977). And in *Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979), the United States Supreme Court applied the three step process for establishing a *prima facie* case of discrimination in the context of grand jury foreman selection:

> That is, "in order to show that an equal protection violation has occurred in the context of grand jury [foreman] selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." *Castaneda v. Partida*, 430 U.S., at 494, 97 S.Ct., at 1280. Specifically, respondents were required to prove their prima facie case with regard to the foreman as follows:
>
> > "The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different

> treatment under the laws, as written or as applied. . .Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as [foreman], over a significant period of time. . . . This method of proof, sometimes called the 'rule of exclusion,' has been held to be available as a method of proving discrimination in jury selection against a delineated class. . . . Finally . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing." *Ibid.*
>
> Only if respondents established a prima facie case of discrimination in the selection of the foreman in accord with this approach, did the burden shift to the State to rebut that prima facie case. *Id.*, at 495, 97 S.Ct., at 1280.

Rose v. Mitchell, 443 U.S. at 565, 99 S.Ct. at 3005.

In *Rose*, the United States Supreme Court held that racial discrimination in the selection of grand jury foremen violates the Fourteenth Amendment to the United States Constitution and requires reversal of a state conviction. In

fact,

> where sufficient proof of discrimination in violation of the Fourteenth Amendment has been made out and not rebutted, [the Supreme Court] uniformly has required that the conviction be set aside, and the indictment returned by the unconstitutionally constituted grand jury be quashed.

Rose v. Mitchell, 443 U.S. at 551, 99 S.Ct. at 2998 (citations omitted). "[S]uch discrimination compels voiding the indictments and convictions." *Guice v. Fortenberry*, 722 F.2d 276, 282 (5th Cir. 1984). There is no other remedy but to reverse the conviction; the error is a fundamental structural defect of the trial not susceptible to harmless prejudicial analysis. *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

Although earlier jurisprudence was less than clear on the issue, the United States Supreme Court in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), clarified that a criminal defendant does have standing to bring an equal protection claim where the issue raised is the rights of others excluded from participation in the judicial process. *Powers* held that, in the context of peremptory challenges of petit jurors, under the equal protection clause, a criminal defendant has standing to objection to race-based exclusions whether or not the defendant and those excluded share the same race.

A reading of the transcript of the argument at the December 2, 1993, hearing and of the trial court's ruling shows that the trial court improperly relied upon the federal case of *Hobby v. United States*, 468 U.S. 339, 104 S.Ct.

3093, 82 L.Ed.2d 260 (1984), in reaching its holding that defendant had no standing to raise his constitutional claims. However, the Louisiana Court of Appeal, Third Circuit, correctly applied the analysis of *Powers* to hold that a white defendant does have standing to raise equal protection claims. Defendant also has standing to raise his due process/fair cross-section claims. Defendant's race is irrelevant in deciding whether he has been denied fundamental fairness as guaranteed to him by the due process clause. The other question here is whether the composition of the grand jury met the Sixth Amendment's fair cross-section requirements when one member of the grand jury was selected in a discriminatory manner.

The first step of the *Castaneda* test is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws as written or as applied. *Rose v. Mitchell*, 443 U.S. at 565, 99 S.Ct. at 3005. The confusion on the issue of standing in the state's argument and the trial court's ruling arises from its misidentification of the term "group." The state contends that "group" includes the defendant. The ruling by the Louisiana Supreme Court is also based in part on this same misidentification. In many of the early equal protection cases such as *Castaneda v. Partida* and *Rose v. Mitchell*, often the defendant was a member of the same minority group that was being excluded in some manner. In *Castaneda v. Partida,* the excluded group and the defendant were Mexican-American; in *Rose v. Mitchell* the excluded group and the defendant were black. The authors of those opinions, therefore, had no reason to draw a distinction between the race of the criminal defendant and the race of the excluded class. But as *Powers* points out, the essence of this type of third party claim is that the rights of the excluded class are being raised by the criminal defendant. When analyzed properly, the "group" referred to is that of the

excluded class, in this case blacks excluded as grand jury foremen in Evangeline Parish. The United States Court of Appeals, Eleventh Circuit, in *United States v. Sneed*, 729 F.2d 1333 (1984), had no problem in recognizing that the defendant need not be a member of the underrepresented or excluded group when raising an equal protection claim of discrimination in the selection process of grand jury foremen.

The group excluded from selection as grand jury foremen is blacks. This is a group that is "a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied." *Rose v. Mitchell*, 443 U.S. at 565, 99 S.Ct. at 3005. As the United States Court of Appeals, Fifth Circuit, has already noted, "[b]lacks compromise a distinct class capable of being singled out for different treatment under the laws." *Johnson v. Puckett*, 929 F.2d 1067, 1072 (5th Cir. 1991). Indeed, in *James v. Whitley*, 39 F.3d 607, 609 (5th Cir. 1994), a case involving issues similar to the case *sub judice*, the state conceded that the petitioner had established that blacks are a recognizable distinct class that receives different treatment under the laws as written or applied.

In its analysis in *Powers*, the United States Supreme Court noted that the discriminatory use of preemptory challenges causes the defendant cognizable injury and he has a concrete interest in challenging the practice because racial discrimination in jury selection casts doubt on the integrity of the judicial process and places the fairness of the criminal proceeding in doubt. Second, the relationship between the defendant and excluded jurors is such that the defendant is fully as effective a proponent of their rights as they themselves would be since both have a common interest in eliminating racial discrimination from the courtroom and there can be no doubt that the defendant will be a motivated,

effective advocate because proof of a jury selected in a discriminatory manner may lead to the reversal of the conviction under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Third, it is unlikely that a juror dismissed because of race will possess sufficient incentive to set in motion the arduous process needed to vindicate his own rights. Thus, the fact that a criminal defendant's race differs from that of the excluded jurors is irrelevant to his standing to object to the discriminatory use of preemptorys.

Identical logic applies to the present defendant's claim of discrimination in selection of grand jury foremen. First, the defendant here is caused a cognizable injury when discrimination in selection of grand jury foreman casts doubt on the integrity of the judicial process and places the fairness of the criminal proceeding in doubt. The defendant here has the concrete interest in challenging such a practice. Secondly, the relationship between this defendant and those excluded from selection as grand jury foremen in Evangeline Parish is identical to the relationship between the defendant in *Powers* and the excluded jurors in that both defendants Campbell and Powers would be effective proponents of the rights of the excluded members and both would have a common interest in eliminating racial discrimination in the courtroom. And finally, it is equally as unlikely in the context of the grand jury foreman selection process in Evangeline Parish that a minority excluded from selection as a grand jury foreman would be likely to posses sufficient incentive to set in motion a suit to vindicate his rights.

Therefore, as in the *Powers*, the fact that defendant's race differs from that of the excluded members is irrelevant to the analysis of his standing to object to the discriminatory practice in question.

B. Violation of Due Process and Fair Cross-Section Rights

In addition to his equal protection claim, the defendant has raised and continues to raise the issue of violation of the rights guaranteed to him under the due process clauses of the United States Constitution and Louisiana Constitution and the fair cross-section clause of the Sixth Amendment. Defendant asserts that by selecting a grand jury foreman in the discriminatory fashion, the entire grand jury was tainted as a result. *Guice v. Fortenberry*, 661 F.2d 496 (5th Cir. 1981)(en banc), echoed the proposition that "[i]f convictions must be set aside because of taint of the grand jury, we see no reason to differentiate the result because discrimination effected only the foreman." *Guice v. Fortenberry*, 661 F.2d at 499. Defendant's races is in no way relevant to his standing to raise these claims. A grand jury chosen in a discriminatory manner can not be said to be unqualified to indict a black man but qualified to indict a white man.

II. The Louisiana Supreme Court Decided an Important Constitutional Issue Which this Court Has Not Addressed in a Manner That Conflicts with Relevant Decisions of this Court

In its ruling in the case *sub judice,* the Louisiana Supreme Court ruled that a defendant does not have standing to bring an equal protection claim challenging exclusion of blacks from serving as grand jury foremen when the defendant is not of the same race or "identifiable group" as those he alleges were excluded from serving as foremen. *State v. Campbell*, 95-0824, p. 4 (La. 10/2/95); 661 So.2d 1321, 1324. The United States Supreme Court has not ruled on the precise question of whether a white defendant has standing to object on equal protection grounds to the exclusion of blacks as grand jury foremen. However, in *Powers v. Ohio*, 499 U.S.

400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), the United States Supreme Court conversely held that "a defendant in a criminal case can raise the third-party equal protection claims of [petit] jurors excluded by the prosecution because of their race." *Powers*, 499 U.S. at 415, 111 S.Ct. at 1373.

The Louisiana Supreme Court further ruled that, under *Hobby*, a white defendant does not have standing to bring a due process claim challenging discrimination against blacks in the selection of grand jury foremen because the role of the grand jury foreman in Louisiana is ministerial. *State v. Campbell*, 95-0824, p. 4-5 (La. 10/2/95); 661 So.2d 1321, 1324. That holding by the Louisiana Supreme Court misapplies the holding and reasoning of *Hobby*. The United States Supreme Court distinguished the case of *Rose v. Mitchell*, stating that:

> Moreover, *Rose* must be read in light of the method used in Tennessee to select a grand jury and its foreman. Under that system, 12 members of the grand jury were selected at random by the jury commissioners from a list of qualified potential jurors. The foreman, however, was separately appointed by a judge from the general eligible population at large. The foreman then served as "'the thirteenth member of each grand jury organized during his term of office, having equal power and authority in all matters coming before the grand jury with the other members there-of.'" *Rose v. Mitchell, supra*, at 548, n. 2, 99 S.Ct., at 2996, n. 2 (quoting Tenn. Code Ann. § 40-1506 (Supp.1978)). The foreman selection process in *Rose* therefore determined not only who would serve as presiding officer, but also

> who would serve as the 13th voting member of the grand jury. The result of discrimination in foreman selection under the Tennessee system was that 1 of the 13 grand jurors had been selected as a voting member in an impermissible fashion. Under the federal system, by contrast, the foreman is chosen from among the members of the grand jury after they have been empaneled, see Fed.Rule Crim.Proc. 6(c); the federal foreman, unlike the foreman in *Rose*, cannot be viewed as the surrogate of the judge. So long as the grand jury itself is properly constituted, there is no risk that the appointment of any one of its members as foreman will distort the overall composition of the array or otherwise taint the operation of the judicial process.

Hobby v. United States, 468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984)

In *Hobby*, the federal grand jury foreman is selected from a properly constituted grand jury. The selection process in Evangeline Parish is similar to that used *Rose*. Pursuant to Louisiana Code of Criminal Procedure, Article 413:

> the grand jury shall consist of twelve persons plus a first and second alternate for a total of fourteen persons qualified to serve as jurors selected or drawn from the grand jury venire. In parishes other than Orleans, the *Court shall select one person from the grand jury venire to serve as foreman of the grand jury*. The Sheriff shall draw indiscriminately by lot from the envelope containing the remaining names

> of the grand jury venire a sufficient number of names to complete the grand jury.

(emphasis added.) As in *Rose*, the trial judge selects one voting member of the grand jury. And the discrimination in the selection of the foreman distorts the composition of the resulting grand jury tainting the whole.

Therefore, the reliance by the Louisiana Supreme Court on *Hobby* is inappropriate in light of the above distinction drawn by the United States Supreme Court between *Hobby* and *Rose*.

III. The Louisiana Supreme Court Decided an Important Constitutional Issue in a Manner Which Conflicts with the Decision of the United States Court of Appeals, Eleventh Circuit

The decision by the Louisiana Supreme Court that a white defendant has no standing to raise in the equal protection claim that blacks were excluded from selection as grand jury foreman is also in conflict with decisions by the United States Court of Appeals, Eleventh Circuit, in *United States v. Sneed*, 729 F.2d 1333 (11th Cir. 1984), *Bowen v. Kemp*, 769 F.2d 672 (11th Cir. 1985), *United States v. Holman*, 680 F.2d 1340, (11th Cir. 1982), and *United States v. Perez-Hernandez*, 672 F.2d 1380, (11th Cir. 1982) (per curiam). The United States Court of Appeals, Eleventh Circuit, has steadfastly ruled that the fact that the defendant is not a member of the underrepresented group does not deprive him of standing to bring a claim of denial of equal protection and exclusion of other groups from serving as grand jury foremen even though he was not of that race (or gender).

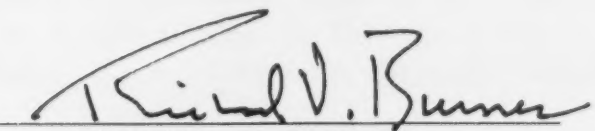
IV. A United States Court of Appeals Has Entered a Decision in Conflict with the Decision of Another United States Court of Appeals on the Same Important Constitutional Matter

The decisions by the United States Court of Appeals, Eleventh Circuit, of *United States v. Sneed*, *Bowen v. Kemp*, *United States v. Holman*, *United States v. Perez-Hernandez*, conflict with the decision entered by the United States Court of Appeals, Fifth Circuit, in *United States v. Cronn*, 717 F.2d 164 (1983). There, the Fifth Circuit, held that "equal protection considerations are not involved in the claim of a white male not to have females and racial minorities excluded from the judicial process as it is applied to him." *United States v. Cronn*, 717 F.2d at 169.

CONCLUSION

This Court should grant certiorari to address the conflicts in the decisions by the Supreme Court of Louisiana, the United States Court of Appeals, Fifth Circuit, and the United States Court of Appeals, Eleventh Circuit, concerning whether a white defendant has standing to object to the rase-based exclusion of grand jury foremen on equal protection and due process/fair cross-section grounds even if not of the same race as those excluded as grand jury foremen.

Respectfully Submitted,
BURNES & BURNES
Attorneys at Law

BY: 

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The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

VS. NO. 95-K - 0824

TERRY CAMPBELL

- - - - - - - -

IN RE: State of Louisiana; - Plaintiff(s); Applying for writ of Certiorari and/or Review; to the Court of Appeal, Third Circuit, Number CR 94-1140, CR94-1140; Parish of Evangeline 13th Judicial District Div. "A" Number 45,690

- - - - - - - -

October 2, 1995

Granted. See per curiam.

CDK
WFM
JCW
HTL
BJJ
JPV

CALOGERO, C.J. not on panel.

DENNIS, J. would deny the writ. The majority's opinion is premature and incomplete inasmuch as it is based on an inadequate record and does not address state constitutional law.

Supreme Court of Louisiana
October 2, 1995

S/ Frans J. Labranche, Jr.
Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

Oct 2 1995

No. 95-K-0824
State
Versus
Terry Campbell

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD CIRCUIT, STATE OF LOUISIANA
S/SDK
PER CURIAM.*

WRIT GRANTED. Defendant was indicted for second degree murder. Prior to trial, defendant filed a Motion to Quash Grand Jury Indictment, alleging the grand jury foreman selection process in Evangeline Parish was discriminatory. The motion was denied. Defendant was later convicted of second degree murder. On appeal, one of defendant's assignments of error asserted the trial court had erred by denying his motion to quash on the basis that he, as a white man, lacked standing to claim discrimination against blacks in the selection of grand jury foremen in Evangeline Parish. The third circuit found defendant had standing to pursue the claim, but did not reach the merits of his claim. The court instead found the statistical information compiled by the defense in support of the claim was incomplete and remanded for further evidence to be adduced.[1]

****Calogero, C.J. not on panel. See Rule IV, Part 2, § 3.***

[1]The court of appeal did not address defendant's remaining assignments of error.

Dennis J., would deny the writ. The majority's opinion is premature and incomplete inasmuch as it is based on an inadequate record and does not address state constitutional law.

The state filed a writ application with this Court, arguing the court of appeal erred in finding defendant had standing to make a discrimination claim on behalf of the excluded black potential grand jury foremen and also that the court of appeal erred in remanding the case to allow the defendant to put on more evidence. We grant the state's writ application, reverse the court of appeal decision, and remand to the court of appeal for further proceedings.

In Rose v. Mitchell, 443 U.S. 545, 99 S.Ct. 2993 (1979), the United States Supreme Court implicitly held two black defendants had standing to bring an equal protection claim that blacks had been unconstitutionally excluded from serving as grand jury foremen when it "assume[d] without deciding that discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside." *Rose,* Id. at 551, n. 4, 99 S.Ct. at 2998, n. 4. Therefore, "in order to show that an equal protection violation has occurred in the context of grand jury ... foreman ... selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." Id. at 565, 99 S.Ct. at 3005 (quoting *Castaneda v. Partida,* 430 U.S. at 494, 97 S.Ct. at 1272). Thus, in the context of an equal protection claim with respect to the selection of a grand jury foreman, *Rose* requires the defendant claiming the violation be of the same "race or identifiable group" as those he alleges were excluded from serving as grand jury foremen.

In Hobby v. United States, 468 U.S. 339, 104 S.Ct. 3093 (1984), the Court was faced with determining whether discrimination in the selection of federal grand jury foremen, resulting in the underrepresentation of blacks and women in that position, required reversal of the conviction of a white male defendant. The defendant had argued this discrimination

was a violation of his due process right under the Fifth Amendment of the United States Constitution. The Court noted that in *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163 (1972), a plurality opinion, it had held a person of any race had standing to bring a Due Process Clause claim challenging the exclusion of any group from petit or grand jury service. The *Hobby* Court held that this would not be the case, however, where a defendant was bringing a due process claim challenging the exclusion of a particular group from serving as grand jury foremen.

The Hobby Court held that discrimination in the selection of a grand jury foreman, as opposed from discrimination in the selection of the grand jury itself, did not impede the defendant's due process rights. "[Even] assuming discrimination entered into the selection of federal grand jury foremen, such discrimination does not warrant the reversal of the conviction of, and dismissal of the indictment against, a white male bringing a claim under the Due Process Clause." Id. at 350, 104 S.Ct. at 3099. The Court focused on the fact that the impact of a discriminatorily chosen grand jury foreman, as opposed to the exclusion of certain groups from participation in the petit or grand jury itself, has only an incidental effect on the criminal justice system:

> Given the ministerial nature of the position, discrimination in the selection of one person from among the members of a properly constituted grand jury can have little, if indeed any, appreciable effect upon the defendant's due process right to fundamental fairness. Simply stated, the role of the foreman of a federal grand jury is not so significant to the administration of justice that discrimination in the appointment of that office impugns the

> fundamental fairness of the process itself so as to undermine the integrity of the indictment.
>
> Nor does discrimination in the appointment of grand jury foremen impair the defendant's due process interest in assuring that the grand jury includes persons with a range of experiences and perspectives. The due process concern that no "large and identifiable segment of the community [be] excluded from jury service," does not arise when the alleged discrimination pertains only to the selection of a foreman from among the members of a properly constituted federal grand jury. That the grand jury in this case was so properly constituted is not questioned . . . .
>
> The ministerial role of the office of federal grand jury foreman is not such a vital one that discrimination in the appointment of an individual to that post significantly invades the distinctive interests of the defendant protected by the Due Process Clause. Absent an infringement of the fundamental right to fairness that violates due process, there is no basis upon which to reverse petitioner's conviction or dismiss the indictment.

Id. at 345-46, 104 S.Ct. at 3096-97 (citations omitted).
The Court distinguished *Rose* on the basis that it involved an equal protection claim brought by a black defendant claiming discrimination against members of his own race in the selection of the grand jury foreman, as opposed to *Hobby,* where the white defendant brought only a due process challenge.

In this case, defendant alleges violations of both the Equal Protection Clause and the Due Process Clause of the United States and Louisiana Constitutions. The court of appeal in the instant case analogized to *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364 (1991) in support for its holding that a white defendant had standing to bring a due process or equal protection claim attacking the process for selecting grand jury foremen as discriminatory against blacks. In *Powers*, the Court held that a white defendant had standing to raise the equal protection claims of jurors excluded because of their race by the prosecution through the improper use of peremptory challenges. The Court reached this decision after a thorough discussion of the great impact racial discrimination in the selection of jurors would have on the defendant as well as on the integrity of the judicial process. The Court stated:

> The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice. This is not because the individual jurors dismissed by the prosecution may have been predisposed to favor [or dislike] the defendant; if that were true, the jurors might have been excused for cause. Rather, it is because racial discrimination in the selection of jurors "casts doubt on the integrity of the judicial process," and places the fairness of a criminal proceeding in doubt.
>
> . . . The intrusion of racial discrimination into the jury selection process damages both the fact and the perception of this guarantee. . . . Active discrimination by a prosecutor during this process [voir dire]

condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law. . . .

. . . A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause. The *voir dire* phase of the trial represents the 'jurors' first introduction to the substantive factual and legal issues in a case. " The influence of the voir dire process may persist through the whole course of the trial proceedings. If the defendant has no right to object to the prosecutor's improper exclusion of jurors, and if the trial court has no duty to make a prompt inquiry when the defendant shows, by adequate grounds, a likelihood of impropriety in the exercise of a challenge, there arise legitimate doubts that the jury has been chosen by proper means. The composition of the trier of fact itself is called in question, and the irregularity may pervade all the proceedings that follow.

The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance

> with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset. Upon these considerations, we find that a criminal defendant suffers a real injury when the prosecutor excludes jurors at his or her own trial on account of race.

Powers, 499 U.S. at 411-13, 111 S.Ct. at 1371-72 (citations omitted).

Under *Rose,* defendant does not have standing to bring an equal protection claim challenging the exclusion of blacks from serving as grand jury foremen as he is not of the same race or "identifiable group" as those he alleges were excluded from serving as foremen. Under *Hobby,* defendant does not have standing to bring a due process claim challenging discrimination against blacks in the selection of grand jury foremen, as in that case, the Supreme Court held that the "ministerial role of the office of federal grand jury foreman is not such a vital one that discrimination in the appointment of an individual to that post significantly invades the distinctive interests of the defendant protected by the Due Process Clause." *Hobby,* 468 U.S. at 346, 104 S.Ct. at 3097. The role of the grand jury foreman in Louisiana appears to be similarly ministerial. Furthermore, under La. C.Cr.P. art. 436, any grand juror who objects to a rule of procedure made by the foreman may seek review from the court. Therefore, as in *Hobby,* discrimination in the selection of a grand jury foreman from a properly constituted venire has little, if any, effect on the defendant's due process right of fundamental fairness.

The United States Supreme Court has not yet addressed whether a white defendant would have standing to

raise the equal protection claims of members of another race who were not selected to serve as grand jury foremen because of their race. Although *Powers* gives to white defendants standing to bring an equal protection claim on behalf of jurors who were excluded from serving on the petit jury because of their race through the improper use of peremptory challenges, that holding was based on the considerable and substantial impact that such obvious discrimination by the prosecutor during voir dire would have on the defendant's trial as well as on the integrity of the judicial system as a whole. The same cannot be said for discrimination in the selection of a grand jury foreman, and we decline to extend *Powers* to such a situation.

The court of appeal erred in holding defendant had standing to bring either the due process or equal protection claims. The case is remanded to the court of appeal for treatment of defendant's remaining assignments of error.

REVERSED AND REMANDED.

NO. CR94-1140

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

MAR 1 1995

STATE OF LOUISIANA

VERSUS

TERRY CAMPBELL

Appeal from the Thirteenth Judicial District Court, Parish of Evangeline, State of Louisiana, Honorable Preston N. Aucoin, District Judge, presiding.

Before PETERS, AMY and SULLIVAN, Judges.

SULLIVAN, Judge.

Defendant, Terry Campbell, was tried by a jury and found guilty on May 12, 1994, of second degree murder, a violation of La. R.S. 14:30.1. He was sentenced to life imprisonment at hard labor, without benefit of probation, parole or suspension of sentence. His appeal urges eleven assignments of error. We remand with instructions.

In Assignment of Error Number 1, defendant contends the trial court erred in overruling his Motion to Quash Grand Jury Indictment. The motion alleged that the grand jury selection process in Evangeline Parish is discriminatory and

in violation of the Sixth and Fourteenth Amendments to the United States Constitution as well as Article I, Section 2; Article I, Section 15; and Article I, Section 16 of the Louisiana Constitution. A hearing on defendant's motion was held on December 2, 1993. In denying the motion, the trial judge stated:

> The court holds that in the case sub judice there is no racial discrimination in the process used in Evangeline Parish, Louisiana against the defendant Campbell. Again I'm restricting all of my comments to this one particular case that we're here on this morning.
>
> This court rules that the defendant Campbell, being a white man accused of killing another white man, Mr. Sharp, was not denied equal protection of the laws and/or due process because of the grand jury foreperson selection process in the past up to the present, where all of the forepersons were white. Therefore, defendant Campbell has no standing to raise that issue. That being the case the court need not consider the other issues. The Motion to Quash the Indictment is denied.

The United States Supreme Court in *Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364 (1991) held that under the Equal Protection Clause, "a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race". *Powers,* at 111 S.Ct 1366. It concluded that a white defendant had standing to raise "third-party equal protection claims" of wrongful discrimination.

The state and the defense stipulated to certain facts at the beginning of the hearing in order to avoid having to call the Registrar of Voters as a witness.

However, this was insufficient to make a determination of discrimination in the grand jury selection process. As noted in *State v. Young,* 569 So.2d 570 (La.App. 1 Cir. 1990), *writ denied,* 575 So.2d 386 (La. 1991):

> However, since the general venire in East Baton Rouge Parish is composed of "qualified" persons drawn from a random list of registered voters and licensed drivers in that parish, the total percentage of a particular minority in the general population does not have a direct bearing on the make-up of the general venire, from which the grand jury venire is randomly drawn, and the grand jury foreman is selected. Rather, it is the percentage of the particular minority in the general population who are either licensed drivers or registered voters, **and** who meet the five qualifications necessary to become a juror, which is the appropriate percentage to compare with the actual percentage of minority grand jury foremen.
>
> Therefore, in order to make a prima facie showing of discrimination in the selection of a grand jury foreman, the defendant must show a disproportion over a significant period of time between the percentage of an identifiable minority in the general venire or grand jury venire, and the percentage of minority forepersons during that time; and that

> the selection process is susceptible of abuse. That is, the defendant must show that the percentage of minority persons in the general population who are qualified to serve as grand jurors is disproportionate to the actual number of minority grand jury forepersons over a significant period of time to establish a prima facie case. (Footnotes omitted.) (Citations omitted.)
>
> *Id* at 575.

The information initially submitted by the defendant included only data from the voter registration list and several record extracts showing the composition of local juries, and did not include the comprehensive data on the jury venire as required in *Young, supra.*

The same reasons enunciated in *Powers* should be employed in defendant's case. Although the role of the foreman of the grand jury in Louisiana may be ministerial in nature, a full evidentiary hearing should have been had on the matter and a ruling handed down on defendant's due process and equal protection claims. *State ex rel. Williams v. Whitley,* 629 So.2d 343 (La. 1993).

This court is sympathetic with the trial judge's concerns in this type of challenge. However, we, like he, must comply with established constitutional mandates. It is noteworthy that the U. S. Supreme Court, in *Rose v. Mitchell,* 443 U.S. 545, 99 S.Ct. 2993 (1979), in dealing with a similar situation, i.e., there never having been a black foreman of a grand jury in Tipton County, Tennessee, nonetheless held that defendant failed to present a prima facie case of discrimination.

Exercising our supervisory jurisdiction under Article V, Section 10, Louisiana Constitution, we remand for such a hearing and determination. If the trial court determines that the grand jury selection process in Evangeline Parish violated defendant's constitutional rights, it must quash the indictment. However, if the trial court finds that the selection process is constitutional, the Clerk of Court of Evangeline Parish is ordered to return this case to us, the record supplemented with the hearing and judge's ruling, so that we can complete the appeal process.

REMANDED, WITH INSTRUCTIONS.

STATE OF LOUISIANA CRIMINAL DOCKET NUMBER 45,690-F

VS 13TH JUDICIAL DISTRICT COURT

TERRY CAMPBELL EVANGELINE PARISH, LOUISIANA

SENTENCING

MOTIONS

May 20, 1994

PRESENT: HONORABLE PRESTON N. AUCOIN, DISTRICT JUDGE

RICHARD W. VIDRINE, Esquire, Assistant District Attorney, Post Office Box 780, Ville Platte, Louisiana 70586, representing the State of Louisiana;

RICHARD V. BURNES, Esquire, Attorney at Law, Post Office Box 650, Alexandria, Louisiana 71309, representing the defendant;

RAYMOND LEJEUNE, Esquire, Attorney at Law, 1401 Poinciana, Mamou, Louisiana 70554, representing the defendant;

TERRY CAMPBELL, Defendant.

BY THE COURT:

. . . Now, let's go to Number 3.

BY MR. BURNES, Counsel for Defendant:

Yes, Your Honor.

BY THE COURT:

Now, Number 3, Mr. Burnes, we went through that the first time round...

BY MR BURNES, Counsel for Defendant:

Yes, sir.

BY THE COURT:

...is when Dobie Gillis first came out. We had a big hearing concerning that. I'm sure you read it in the record already.

BY MR. BURNES, Counsel for Defendant:

Excuse me - when who came out, Your Honor. Did you say Dobie Gillis?

BY THE COURT:

Dobie Gillis case. You remember the case - was it Grant Parish?

BY MR. VIDRINE, Assistant District Attorney:

Sabine Parish.

BY THE COURT:

Yes, where there was no black foreman - where a black foreman had never been made - there was never a black foreman before and they said that counsel was ineffective in not finding that out and it was remanded. I've familiarized myself with those aspects of the case very well. But, I mean,

I don't want to take away your right to argue but I did go into it in great detail.

BY MR. BURNES, Counsel for Defendant:

I'll try to be brief on it, Your Honor. This is one of the few pre-trial hearings that I didn't transcribe, but I did get the exhibits and talk to the attorney that was involved. I'd like to point out . .

BY THE COURT:

Certainly the court accepts the fact that there had never been a black person named as foreperson of a jury before that time. I mean you don't have to argue that because that was proven.

BY MR. BURNES, Counsel for Defendant:

Your Honor, one of the cases - the interesting thing in reviewing these cases there is reference to the Fourteenth Amendment. Well, the Fourteenth Amendment is both the due process clause and the equal protection clause. If you hunt for the due process clause and the equal protection clause you are going to find them both in the Fourteenth Amendment.

BY THE COURT:

That's the Johnson case you're talking about?

BY MR. BURNES, Counsel for Defendant:

Well, Your Honor, they cited the Johnson case.

BY THE COURT:

Johnson versus Puckett.

BY MR. BURNES, Counsel for Defendant:

Yes, and the reason I wanted to mention that is that they cited it, because by citing it when they have invoked the

14th Amendment they have involved both due process and equal protection. Now, there is some distinction, or they may have thought to be some distinction, in the historical development of this. For instance, in the Johnson vs Puckett case they refer to the Hobby case. A United States Supreme Court decision in which they did not give a relief and they said that the request there was under the nature of the due process of the 14th Amendment. But they said in the Johnson case we are looking at equal protection, which is also 14th Amendment but another section of the constitution. So, the reason that I am point out that we've hit that equal protection clause is because we have alleged the grounds that put us before you, not necessarily on the Hobby case, and incidentally the Hobby case, Your Honor had three descents. Now, I know that even if you have a bare majority it is still a ruling but three descents indicate there well may be some problem with that being established law. Now, I think what you addressed the lawyers in the hearing you asked them, well, if you conceded that this grand jury is unconstitutionally impaneled as to a black person, why would it be unconstitutionally impaneled as to a white person. Good question. And, there are some answers to that Your Honor. One I think Peters versus Kiff, United States Supreme Court decision deals, I believe, that is with petit jurors, there they held in citation of that is 407, U.S. 493, 33 Lawyers Edition 83, 92 Supreme Court 2163 and it is a 1972 decision. They held that the indictment and conviction of a white man he could complain that neqroes were excluded, arbitrarily excluded. Now, besides that case by way of comparison if you look at Taylor versus Louisiana. For a long time in Louisiana we never had women on the jury unless they came down and volunteered. Of course, I filed a motion to quash a case one time and it got to the Louisiana Supreme Court and I lost by one vote and right after that I thin this case came out, and it says that a man can complain about that

discrimination - has standing to complain because it denied him the cross section of the community. There was a case that came out that said the women can complain and a man can complain. Now, if a man can complain that a woman has to go down and volunteer to be on - which is not the law now. It used to be strange to see a woman on the jury. But, if a man cam complain that he is not part of that class or part of that group, then the same analogy would apply on racial exemptions or exclusions. More than that, Your Honor, Johnson vs Puckett reflected what is happening in the jurisprudence. They set it out in there. Besides the equal protection claim is the harm to society. You don't have to be a member of that group. It says the injury to equal protection caused by racial discrimination in the selection of members of a grand jury is not limited to the defendant.

BY THE COURT:

But, don't you think all of this is designed to avoid prejudice to the defendant? Isn't that the underlying basis and the underlying foundation for all of this?

BY MR. BURNES, Counsel for Defendant:

Judge, it is designed just like when we started our integration here awhile back in our schools. Now, I think we are at a 40th anniversary or something of that. It started now to where you say we are now protecting the system. There are cases that are saying that and Johnson says it. They put it on the equal protection clause and we put ourselves in Johnson in this case and we're saying that the system is wrong. How can you have a grand jury that says we can indicate black men and another grand jury constitute another way we can indictment white men. No, you can't, your Honor. It is either an invalid grand jury or it isn't. Your Honor, going back to Code of Criminal Procedure Article 872, to have a valid sentence you have to have a valid statute, a valid indictment,

and a valid plea of guilty or judgment of conviction and this is not a valid indictment. It was returned by an unconstitutionally constituted grand jury. Again, law - we never get it all aligned, Your Honor.

BY THE COURT:

That's right.

BY MR. BURNES, Counsel for Defendant:

We can't. They put it on us. And the older we get the more we have to learn. Maybe years ago this didn't make a difference, but since 1991 it has, at least as far as this Johnson versus Puckett case is. Now they are talking about not the individuals group but the harm to society. That gets around, Your Honor, like those thats an objection, and its a reverse and that's an objection to where if you are excluding white people you can object whether you are a member of that group or not. Because, and what they are saving, the use the same language. They opened up this Johnson versus Puckett and they are talking about what equal protection means. It is not just that you are a member of that group. But, the harm to society. In other words you get that cross section, you get a fair grand jury. And, I'm not taking away from anything that was said at the other hearing, but I know, Your Honor, questioned the lawyers and they may well have responded adequately. I don't know. But, I ask them and they say that is what the judge was saying, well, why is it not that group. That is why I dug out this Taylor case and that Peters case and why I analyze this Johnson versus Puckett case and realize the difference in due process and equal protection and this broadened concept of equal protection which means a harm to society. In other words, Your Honor, is to protect society's right of equal protection by saying you cannot - not Your Honor but the system - I know you didn't set it up wrong, but it is kind of inherited and passed down and this is

the rule and we have to follow it. We have made a timely motion and based on that we submit that the motion to quash should have been granted. If it is granted then we are back to ground zero.

BY THE COURT:

Mr. Vidrine.

BY MR. VIDRINE, Assistant District Attorney:

Your Honor, we would adopt the argument that was made at the hearing when this first came up when Mr. Small was representing the...

BY THE COURT:

When Dobie Gillis came out.

BY MR. VIDRINE, Assistant District Attorney:

That is correct, Your Honor, the Sabine Parish case. In addition to that, Your Honor, we would simply say that in a case not too long ago, State versus Davis Second Circuit, February of this year, 1994, they referred to the Johnson versus Puckett case and in that case the court said, "In brief Davis argues that the statistical evidence from the records of the Registrar of Voters shows that between '71 and '91, 86.7% of the grand jury foremen were white and 13.3% black. He contends that this establishes a pattern of discrimination that violates equate protection" as argued by Mr. Burnes. Then the court said, "This court recently analyzed Caddo Parish's procedure for selecting jury foremen in State versus Thomas. We found that while the group against whom discrimination is asserted is a recognizable distinct class singled out for different treatment. The defendant did not prove what he needed to prove." But, again it shows you that it has to be a distinct recognizable group and that is the same basis upon which Your Honor made the

ruling earlier.

BY THE COURT:

All right. I'm prepared to rule. on Paragraph 3 of the Motion for a New Trial. This is the Court's ruling. Since Terry D. Campbell is a white person this court holds that the fact that at the time he was indicted that there had never been a black person named as a grand jury foreman in Evangeline Parish Louisiana, which incidentally is no longer the case, as ya'll know, that that does not constitute a violation of Mr. Campbell's constitutional rights including a due process violation. The court has already ruled in a similar motion with ample reasons being a motion to quash the indictment which was filed by Mr. Mike Small when he represented Mr. Campbell the first time around. The ruling is already in the record. The court adopts it by reference in ruling on this motion. Thank you. Proceed with Number 4 of the motion for a new trial.

STATE OF LOUISIANA **CRIMINAL DOCKET NO. 45,690-F**

Dec 6 1203 pm '93

VERSUS **13TH JUDICIAL DISTRICT COURT**

TERRY CAMPBELL **EVANGELINE PARISH, LOUISIANA**

JUDGMENT

This case came for hearing on the "MOTION TO QUASH GRAND JURY INDICTMENT" filed by defendant, **TERRY CAMPBELL,** which hearing was held on December 2, 1993.

APPEARANCES: Defendant, **TERRY CAMPBELL,** and his attorney's, J. Michael Small, Jesse Hearin and Raymond LeJeune, appearing for J. Jake Fontenot;

and

The State of Louisiana, represented by Richard W. Vidrine, Assistant District Attorney;

For the reasons orally assigned in open court, after the hearing of this case:

IT IS ORDERED, ADJUDGED AND DECREED that the "MOTION TO QUASH GRAND JURY INDICTMENT" filed by defendant, **TERRY CAMPBELL,** be and the same is hereby denied.

JUDGMENT rendered on December 2, 1993.

JUDGMENT read and signed on this 6th **day of December, 1993, at Ville Platte, Evangeline Parish, Louisiana.**

S/Preston N. Aucoin
PRESTON N. AUCOIN
DISTRICT JUDGE

S/12-6-93
This is to certify that a copy
of the above and foregoing
S/Judgment
Has been mailed to:
S/Richard Vidrine
S/Mike Small
S/Jake Fontenot
S/TCA Deputy Clerk of Court

STATE OF LOUISIANA CRIMINAL DOCKET NUMBER 45,690-F

VS 13TH JUDICIAL DISTRICT COURT

TERRY CAMPBELL EVANGELINE PARISH, LOUISIANA

MOTIONS
DECEMBER 2, 1993

PRESENT: HONORABLE PRESTON N. AUCOIN,
DISTRICT JUDGE

RICHARD W. VIDRINE, Assistant District Attorney, representing State of Louisiana;

MIKE SMALL, JESSE HEARIN, JAKE FONTENOT, representing the defendant;

TERRY CAMPBELL, Defendant, Not present.

BY THE COURT:

This is in the case of State of Louisiana versus Terry D. Campbell, Number 45,690, which is going to come before the Court on defendant's Motion to Quash the Grand Jury Indictment. The record will show that Mr. Campbell is present in court.

BY MR. SMALL, Counsel for Defendant:
No, sir, Mr. Campbell is not here.

BY THE COURT:
Okay. I just assumed it was Mr. Campbell. I hadn't even looked.

BY MR. SMALL, Counsel for Defendant:
That's my youngest son.

BY THE COURT:
Oh, is that your son?

BY MR. SMALL, Counsel for Defendant:
He's working with me. His grades weren't quite as good as they should be, Judge, and he's out for a semester. He's working in my office until he starts back to college In Lafayette.

BY THE COURT:
He goes to USL?

BY MR. SMALL, Counsel for Defendant-:
Yes, sir.

BY THE COURT:
Great. That's my school. Good Morning, Mr. LeJeune. Good Morning, Mr. Vidrine.

Let me ask you something. I don't think we have the Motion to Suppress yet. Have you filed it? Tina was asking about it.

BY MR. SMALL, Counsel for Defendant:
The motion was filed months and months ago.

BY THE COURT:

Okay. Fine. We thought it was recently filed.

BY MR. SMALL, Counsel for Defendant:

It was filed with the original motions, Your Honor.

BY THE COURT:

Then I'll just set it instanter. That's fine. I was just concerned that it wasn't in the record.

BY MR. SMALL, Counsel for Defendant:

It should be. I have a copy.

BY THE COURT:

I'll tell you what I'm going to do, I'm going to set it for 1:00 P.M. Is that satisfactory?

BY MR. SMALL, Counsel for Defendant:

Yes, Your Honor. Your Honor, I also should apprise the court at this time that on the way to the courthouse, as we speak, there is a supplemental motion to that suppression motion which has one additional ground.

BY THE COURT:

Do you have it?

BY MR. SMALL, Counsel for Defendant:

It is being sent as we speak. It will be here before 1:00 o'clock.

BY THE COURT:

All right. I simply said that the motion is set for 1:00 P.M. on December 2. All right. Let's see. Mr. Hearin, you are the mover. Let me ask you all something. Mr. Vidrine, you

have examined the exhibits that are attached to the motion, haven't you?

BY MR. VIDRINE, Assistant District Attorney:
Yes, I have, Your Honor.

BY THE COURT:
Do you disagree with any of them?

BY MR. VIDRINE, Assistant District Attorney:
I have no reason to disagree with any of them, Your Honor.

BY THE COURT:
All right. That's fine. Mr. Hearing, you may proceed at your pleasure.

BY MR. HEARIN, Counsel for Defendant:
Your Honor, I would like to start off by seeing if the State would stimulate to the attachments as far as evidentiary purposes so I would not have to call the workers in the Registrar of Voters Office.

BY THE COURT:
I think Mr. Vidrine is inclined to agree with that. Is that correct, Mr. Vidrine?

BY MR. VIDRINE, Assistant District Attorney:
That is correct, Your Honor.

BY THE COURT:
All right. I'm going to approve that stipulation, that the exhibits attached to the motion are correct.

BY MR. HEARIN, Counsel for Defendant:

Thank you, Your Honor. in light of the recent Supreme Court Decision in Dobie Gillis Williams versus John P. Whitely, the Warden, 93KD2709 is the Docket Number, which came out November 2 of this year. The Supreme Court...

BY THE COURT:

Let's put this thing in its proper perspective. Dobie Gillis Williams was a white man or a black man?

BY MR. HEARIN, Counsel for Defendant:

He was black.

BY MR. SMALL, Counsel for Defendant:

I was involved in the case post-conviction. The defendant In Williams was black. His victim was a white woman.

BY THE COURT:

Okay. Thank you very much. You may proceed.

BY MR. HEARIN, Counsel for Defendant:

The Supreme Court stayed an execution and - in order to remand the District Court for an evidentiary hearing on the issue of discrimination in the Grand Jury Foreperson selection procedures.

BY THE COURT:

What do you understand that to mean? What would that evidentiary - I know what they said it was about. But, in essence what would be required more than what you have attached to your motion today.

BY MR. HEARIN, Counsel for Defendant:

At that hearing to carry our burden, Your Honor?

BY THE COURT:

No, in Dobie Gillis' case. What do you think that evidentiary hearing would consist of?

BY MR. HEARIN, Counsel for Defendant:

I think that evidentiary hearing would consist of - the first part of it would be the trial judge's ruling on whether the defendant carried his prima facie case.

BY THE COURT:

Okay. That would be in the record though.

BY MR. HEARIN, Counsel for Defendant:

If he determined that then the burden would shift to the state to prove that the discrimination, that the selection procedures were not discriminatory in nature...

BY THE COURT:

All right. That would be based on the percentages and everything that has reflected on these documents that you have attached to your motion?

BY MR. HEARIN, Counsel for Defendant:

The state's burden, Your Honor? The state's response could be based on the selection...

BY THE COURT:

It would have to be based on those statistics, wouldn't it?

BY MR. HEARIN, Counsel for Defendant:

They could use other evidence also, Your Honor, of the selection procedures employed by the judges when they

select a grand jury foreman. In other words,...

BY THE COURT:

That is pretty well spelled out in the statute though - the grand jury selection process.

BY MR. HEARIN, Counsel for Defendant:

Right. But, the - in other words they would have to overcome the statistical analysis through - generally it would have to be other things because the numbers are constant.

BY THE COURT:

As I understand it and I say this for the record, as I understand it here in Evangeline Parish, especially between the years that you have designated in your motion, there has been no black grand jury forepersons.

BY MR. HEARIN, Counsel for Defendant:

That is true, Your Honor. I checked the last 35 grand jury
forepersons and none of them were black.

BY THE COURT:

So, what more would you need at the evidentiary hearing?

BY MR. HEARIN, Counsel for Defendant:

The state would have to try and rebut the presumption that is raised by those numbers. That is what the evidentiary hearing would be...

BY THE COURT:

That satisfys me. That's a good answer. Okay.

BY MR. HEARIN, Counsel for Defendant:

Defendant has ... confessed racial discriminatory...

BY THE COURT:

That's what I meant to say. Now, let's get to that.

BY MR. HEARIN, Counsel for Defendant:

He has standing to contest racial discrimination in the jury context in selection of the jury. This is based upon Ohio versus Powers, 111 Supreme Court, 1364, 1991, U.S. Supreme Court case. In Ohio versus Powers it was preemptory challenges which were being used in a racially discriminary...

BY THE COURT:

It wasn't about grand jury forepersons.

BY MR. HEARIN, Counsel for Defendant:

No, it was not. But it showed that the excluded jurors had - the party who brought it who was not of the same race had standing to assert the rights of excluded jurors. That is what it stands for. In other words, when racial discrimination goes on in the jury selection context that is an injury to society as a whole and the actual person bringing the claim is not the importance. It is to rectify the damage to society as a whole in the appearance of discrimination in the selection procedures. This was in the regular trial jury context.

BY THE COURT:

Okay. What is the discrimination? Dobie Gillis was a colored man. This man, Defendant Campbell is a white man. What is the discrimination?

BY MR. HEARIN, Counsel for Defendant:

The discrimination is that blacks do not get to sit as

grand jury forepersons in Evangeline Parish.

BY THE COURT:

Okay. But you haven't answered my question. How does that discriminate against Campbell since he is not black.

BY MR. HEARIN, Counsel for Defendant:

Well, it discriminates against him in one manner in that if we hold today that Mr. Campbell does not have standing to assert this claim, then the grand juries in Evangeline Parish are valid to indict white people but not to indict black people. That is discrimination against Mr. Campbell.

BY THE COURT:

That is not the first time that something like that happens. I mean that is what it is all about. That is how the black persons got their rights determined by the court. I mean, certainly you had to have a different rule for them. You had to deviate from the old rule for black persons. I'm asking you why do vou have to do it for white persons.

BY MR. HEARIN, Counsel for Defendant:

For the reason I just stated in that the grand jury can't be constituted to indict only white persons.

BY THE COURT:

What you're saying - let me stop you. That you're saying lets look at this logically. You are saying that Defendant Campbell is a white man but he has been discriminated against because there has been no black grand juror forepersons. That's what you are saving. All right. You could carry that one step further. You could say that it is because the District Attorney is not black and he can't file a - in another case. Wait, I want you to answer my question.

Logically you could carry this to the D.A. Say the D.A. is not a black man so he can't file an information. Richard Vidrine is not a black man so he can't file an information against a white man. Is that what you are saying? I mean, how - where would it stop.

BY MR. HEARIN, Counsel for Defendant:

No, I'm saying that blacks in Evangeline Parish are being denied the right to sit as grand jury foremen.

BY THE COURT:

But, Mr. Campbell is not a black. That is my whole point.

BY MR. HEARIN, Counsel for Defendant:

But, Terry's rights have not been violated. Terry is asserting third party rights of those excluded.

BY THE COURT:

Now we are dealing with standing to complain. That's what we are arguing about.

BY MR. HEARIN, Counsel for Defendant:

That's correct, Your Honor. He has third party standing to assert the rights of those blacks who have been excluded in the grand jury foreman selection process...

BY THE COURT:

Let me ask you something, Mr. Hearin. Does this apply to women too? Supposing we would show that there has never been a woman foreperson in Evangeline Parish. Could men complain of that or could it be only women?

BY MR. HEARIN, Counsel for Defendant:

I believe that Ohio versus Powers dealt with race. So whether or not we extend to gender would be...

BY THE COURT:

Yes, but Ohio versus Powers is a challenge on voir dire.

BY MR. HEARIN, Counsel for Defendant:

That is true. But it stands for the proposition that society's interest in racially neutral selection procedures is society's interested the third party standing is allowed in that context because of the importance of the...

BY THE COURT:

But you know it says regardless of national origin, race, sex, economic status and so on and so forth. I mean, you know you have to admit that this is a very, very narrow thing. I mean, when you are citing in on the grand jury foreman - supposing you would have a - the eleven other members would be black. But the foremen would always have been white. It would still be tainted?

BY MR. HEARIN, Counsel for Defendant:

Well, Your Honor, one-twelfth of the selection of each grand jury is susceptible to abuse the way the system is set up right now. Due to our statistics we have raised the presumption that there has been abuse.

BY THE COURT:

Now, you see, if Mr. Campbell was a black man this would be making much more sense to me. You can appreciate that can't you?

BY MR. HEARIN, Counsel for Defendant:

Well, I think that I have case law in U.S. versus Snead, 729 F 2nd, 1333, 11th Circuit, 1984.

BY THE COURT:

Okay. But, what do you do with Hobby versus United States, 468 U.S. 339, 104 Supreme Court 3093, 1984.

BY MR. HEARIN, Counsel for Defendant:

Hobby versus United States is not applicable. it is a due process claim.

BY THE COURT:

Okay. But why isn't this a due process why isn't this due process as well as equal protection of the laws?

BY MR. HEARIN, Counsel for Defendant:

I think a petitioner has a due process claim as well as a Sixth Amendment fair cross section claim and an equal protection claim.

BY THE COURT:

Okay. But, let's talk about Hobby. Isn't that the law? I mean, in Hobby, Hobby was a white male.

BY MR. HEARIN, Counsel for Defendant:

Hobby is in the Federal Grand Jury form in context and is a due process claim. In the Federal Grand Jury context all the grand jurors are selected and then the judge picks from them and therefore the rational of Hobby was that the grand jury foreman is a ministerial position. Contrary to that and much more similar to the facts in the Rose versus Mitchell which is...

BY THE COURT:

WAIT A MINUTE. The Federal judge still names the foreperson.

BY MR. HEARIN, Counsel for Defendant:

He does, but the grand jury has already been constituted and it has been constituted in a random fashion. In Louisiana eleven grand jurors are constituted in a random fashion. One is selected solely by the judge.

BY THE COURT:

That's not right.

BY MR. HEARIN, Counsel for Defendant:

That makes the selection process much more significant in that it taints the entire venire. The 5th Circuit has stated as much in Geis versus Fortenberry ...

BY THE COURT:

What if the state does it like the federal judge.

BY MR. HEARIN, Counsel for Defendant:

Then perhaps an argument under Hobby could be made but it would have to be extended to the equal protection context as well if it was an equal protection argument. The two things that distinguish Hobby is it is due process and that the federal grand jury foreman - you already have a grand jury. It has been selected constitutionally. We just are going to decide who the one who is going to be in charge. In Louisiana we decide who is going to be in charge before we do the random lot. So, therefore, the susceptibility of abuse which is mentioned in the case law is much more prevalent in our situation. In other words, one twelfth of the jury could conceivably be picked in a discriminatory manner. In the federal system that's not possible. They could give on juror

a little bit more statute...

BY THE COURT:

Just a minute. Of course, the federal judge has twelve of them. He picks one of them. He is discriminating - he's doing it. It's within his discretion. That's how he does it.

BY MR. HEARIN, Counsel. for Defendant:

Yes, he does, but he already has the entire grand jury selected. In Louisiana this taints not only the grand jury foreman context, but it taints the grand jury itself.

BY THE COURT:

What if the state judge would do it like a federal judge?

BY MR. HEARIN, Counsel for Defendant:

He might be able to argue under Hobby although I wouldn't conceive that a Louisiana grand jury foreman is ministerially in that context either. But the argument might be made.

BY THE COURT:

I follow you.

BY MR. HEARIN, Counsel for Defendant:

I think the applicable supreme court case is Rhodes vs Mitchell which looked at a Tennessee grand jury foreman being selected. That's 443, U.S. 545, in which the foreman was selected in much the same way as we do it here in Louisiana. And, there the supreme court said that selection without deciding the selection of the grand jury foreman itself would be subject to racial discriminatory claims in the equal protection context. Also there is case law, Peters versus Kiff in the United States Supreme Court, 407 U.S. 493, in which

they said that race is of no relevance in that discriminatory context.

BY THE COURT:

Mr. Hearin, is there a federal decision that says that when the defendant is a white man and if he shows that there has never been any black foreperson serve on the ground jury that it is a denial of equal protection of the law. Is there a federal decision?

BY MR. HEARIN, Counsel for Defendant:

U.S. versus Snead, 729 F 2nd, 1333, 11th Circuit 1984 stands for that proposition.

BY THE COURT:

What about Hobby? That's the Supreme Court.

BY MR. HEARIN, Counsel for Defendant:

But, it's not applicable to our facts, Your Honor. It wasn't looking at a state selected grand jury foreman. It was looking at it federally and because the difference...

BY THE COURT:

That's how you distinguish it.

BY MR. HEARIN, Counsel for Defendant:

That's how I distinguish Hobby, Your Honor.

BY THE COURT:

Okay. Very good.

BY MR. HEARIN, Counsel for Defendant:

I would also point the language of Guice versus Fortenberry, 5th Circuit, 661 F2nd 486, 1981 in which language to the effect of prejudice to the defendant himself is

not - I'm paraphrasing, Your Honor, - prejudice to the defendant. Which, of course, is the traditional equal protection inquiry injury in fact and I would submit that Guice versus Fortenberry, Piers versus Kiff, U.S. versus Snead, Rhodes versus Mitchell and Ohio versus Powers stand for the proposition that a white defendant has third party standing to assert the black citizens right to be selected to a grand jury. He only has the right if we were able to prove our case to sit on eleven twelfths of the grand jury here. One spot is not available.

BY THE COURT:

Let me ask you this. If your client was charged with a lesser offense, let's say he was charged with aggravated battery, all right, do you believe that a white District Attorney or a - if you have only had white District Attorneys that they could file an information against him?

BY MR. HEARIN, Counsel for Defendant:

I do believe so, Your Honor.

BY THE COURT:

Okay. What is the difference?

BY MR. HEARIN, Counsel for Defendant:

Well, the difference is first of all the defendant has a right under state law for the offense he is charged with to be indicted by a grand jury.

BY THE COURT:

He has rights too if it is a bill of information that has been filed against him. What is the difference?

BY MR. HEARIN, Counsel for Defendant:

The District Attorney is an elected position. The grand

jury foreman is a person selected by the judge who is the similar...

BY THE COURT:

In the federal system they are not elected. No, sir, the District Attorneys are not elected in the federal system.

BY MR. HEARIN, Counsel for Defendant:

They are not selected by the judge.

BY THE COURT:

They are selected by the President.

BY MR. HEARIN, Counsel for Defendant:

They are selected by the President, but the difference is that in the Louisiana context the judge selects the person who is going to be there. The judge is supposed to be epitomy of neutrality. He is
the symbol of fairness. He is the symbol of the court.

BY THE COURT:

But ... say that he is not.

BY MR. HEARIN, Counsel for Defendant:

I'm saying that that is why there is concern in this area of the law for this and especially to - it is even more compelling here than in the peremptory challenge context because there the D.A. and the defense attorney adversarials are trying to do something on behalf of their client. Here in selecting a grand jury foreperson there can be no other reason than fairness and equality for the judge to make the selection. There is no...

BY THE COURT:

You don't have any evidence before this court that the

grand jury was not fair.

BY MR. HEARIN, Counsel for Defendant:
I don't submit that...

BY THE COURT:
You're not even arguing that, are you?

BY MR. HEARIN, Counsel for Defendant:
I'm not arguing that - that there was not, as far as their determinations, I haven't even done that research or given it much thought, Your Honor.

BY THE COURT:
I'm looking at this thing very close, Mr. Hearin. I want you to know that. I read all of your brief and I read everything that you filed. I'm very interested in this and I want you to know it. I think you are making a good argument.

BY MR. HEARIN, Counsel for Defendant:
I would just also emphasize some case law in which - well, actually I'd like to move on to the prima facie case, Your Honor, if you are...

BY THE COURT:
All right.

BY MR. HEARIN, Counsel for Defendant:
In order to show a prima facie case the defendant must show that a recognizable distinct group was discriminated against. He must prove the degree of underrepresentation was - by comparing the general population as we did in our affidavit.

BY THE COURT:

That has been done. In fact,....

BY MR. HEARIN, Counsel for Defendant:

One and two have been met. I think we would all agree.

BY THE COURT:

From your point of view there is more over here than there was in Sabine Parish.

BY MR. HEARIN, Counsel for Defendant:

That's true. In Sabine Parish it was 14 to 16%.

BY THE COURT:

Figures don't lie. I understand that.

BY MR.HEARIN, Counsel for Defendant:

Here it is 23.25% eligible voters. I think the battle ground prima facie case is selection procedures susceptible to abuse. Actually I don't think there is as far as putting on a prima facie case I don't think we really have a significant...

BY THE COURT:

But that is contingent on the court finding that Campbell is standing to complain.

BY MR. HEARIN, Counsel for Defendant:

Absolutely right.

BY THE COURT:

Okay.

BY MR. HEARIN, Counsel for Defendant:

So in order to satisfy the three tests I would submit it

is beyond dispute - a recognizable distinguishable group is blacks in America. I could cite Johnson versus Puckett a Fifth Circuit Court opinion, 1991. I can get you the cite on that.

BY THE COURT:

It's in your brief. You have it in your brief, don't you?

BY MR. HEARIN, Counsel for Defendant:

Yes, Your Honor.

BY THE COURT:

I read your brief.

BY MR. HEARIN, Counsel for Defendant:

So, being prone to the under representation by comparing, uh, clearly our actual disparity is 23.25%, also the fact that zero have been chosen tends to be emphatic because I mean when zero are chosen as the Fifth Circuit said nothing is emphatic as zero. That's again from Johnson versus Puckett. So, since there is 23.25% eligible and zero have been chosen that is an actual disparity and, uh, in U.S. versus Hernandez 672 F 2nd, 1380 at Page 1387, Eleventh Circuit case 1982, the court held that 14.6 actual disparity was clearly under representation. So, in other words, the difference between the eligible population and the percentage shown, which is our case is zero.

BY THE COURT:

uh-huh.

BY MR. HEARIN, Counsel for Defendant:

In the third - I think he has met - the third simply requires that the selection procedure is susceptible to abuse. At this stage of the proceedings I don't have to show that it

is evil intent or that abuse has occurred, but clearly if a person wanted to abuse the procedure as it stands they could. if there were someone who wanted to appoint only Chinese people to the grand jury foreman position they could under the law.

BY THE COURT:

Let me stop you for a moment. Let's say that you are correct. Now, all of this has, so for, has come before the court on post-conviction relief. As far as I know this is the first one that has been argued before the trial. Isn't that correct? There may be some others throughout the state, but I don't know of them.

BY MR. HEARIN, Counsel for Defendant:

The law that I have-seen has come in...

BY THE COURT:

I mean Dobie Gillis was post-conviction.

BY MR. HEARIN, Counsel for Defendant:

That's true, Your Honor.

BY THE COURT:

All right. Now, what I want to ask you. Let's assume for the purposes of this question that, you are correct and I sustain you. That's going to wipe out all of those convictions that were ever this would wipe out all Evangeline Parish convictions where there was a grand jury indictment?

BY MR. HEARIN, Counsel for Defendant:

They would have to have their own hearing and they could go back to the grand jury that indicted...

BY THE COURT:

Yes, but we know the answer. Every grand jury that indicted them had a white foreman.

BY MR. HEARIN, Counsel for Defendant:

It would depend on....

BY THE COURT:

I mean it would wipe them all out - even though ten years ago, twelve years ago, twenty years ago, two years ago - you'd wipe them all out?

BY MR. HEARIN, Counsel for Defendant:

Well, each defendant would have to show his own time period. Okay? Our ...

BY THE COURT:

No, but look, each defendant would show exactly what you are showing for Campbell. They would probably find your brief and submit that. Your figures don't lie.

BY MR. HEARIN, Counsel for Defendant:

They could show, perhaps someone that had been indicted in 1986 could show that, uh, that ...

BY THE COURT:

I think Dobie Gillis was ...

BY MR. HEARIN, Counsel for Defendant:

...the time frame is not relevant. I would submit that if we rule on that this does not win only on standing then we would still have the same problem with all the blacks who had ever been indicted.

BY THE COURT:

Because you know, let me tell you if I rule that way

or if a court higher than me rules that way you know what you're doing. You know what door you are opening?

BY MR. HEARN, Counsel for Defendant:
I do know that, Your Honor.

BY THE COURT:
Proceed.

BY MR. HEARN, Counsel for Defendant:
I do submit that in each case it would be individual and no I don't know the answer...

BY THE COURT:
Yes, you say that, but as a matter of fact it wouldn't be individual. They don't have the same motion. Look it would circulate through the penitentiary. I can see it. We would have catalogs of them.

BY MR. HEARN, Counsel for Defendant:
And I do not know the retro-activity question as far as ...

BY THE COURT:
Now, you're cooking. That is what - you touched on something good there. I think the court would have to deal with that, don't you? I don't think they could make it go back to 1900. There might be some still in jail since 1900 I don't know. I doubt it.

BY MR. HEARIN, Counsel for Defendant:
Perhaps. My point being that the remedy in this situation and the fact that...

BY THE COURT:

The remedy you want is to quash the indictment. That's what you want.

BY MR. HEARIN, Counsel for Defendant:
Before trial.

BY THE COURT:
That's why we are here today and the trial is Monday.

BY MR. HEARIN, Counsel for Defendant:
That's true, Your Honor, but I submit that if it is relevant, if it is allowed to do it after the conviction it's silly not to deal with it before the trial.

BY THE COURT:
According to the Louisiana Law I think you are supposed to do it before the trial. Motions to Quash, you know, to raise issues like that it is proper. Your motion is properly brought. I'm not saying that it is not, you understand, and I don't think that the state is going to object that you can file a Motion to Quash prior to the commencement of the trial. It is just that this raises all kinds of issues, Mr. Hearin.

BY MR. HEARIN, Counsel for Defendant:
I recognize the practical implications.

BY THE COURT:
You understand that.

BY MR. HEARIN, Counsel for Defendant:
Simply stated that the law as it stands has a remedy for this situation. That remedy is before trial to quash the indictment.

BY THE COURT:

How would we do that? Let's say that you are right and not start. Okay. Then I would have to say, Evangeline Parish has - what - 23.8G% or something like that.

BY MR. HEARIN, Counsel for Defendant:

23.25% blacks.

BY THE COURT:

So -then I would have to say, all right, we have two grand jurys a year and let's figure out the percentage. That would be roughly one-fourth. So it would be one-fourth black and three fourths white. That would mean that every fourth grand jury would have to have one black foreperson. Right?

BY MR. HEARIN, Counsel for Defendant:

That's not correct Your Honor.

BY THE COURT:

Okay. Tell me why it is not.

BY MR. HEARIN, Counsel-for Defendant:

The selection procedure would have to be racially neutral which is what the state...

BY THE COURT:

Yes, but that's not what you're saying. Let me tell you something. That's not what you are saying. You are saying that because Evangeline Parish is nearly 24% black that we would have to figure out a way to have a black foreperson approximately 24% of the time. That's what you are saying.

BY MR. HEARIN, counsel for Defendant:

No, I'm not.

BY THE COURT:

Then what are you saying?

BY MR. HEARIN, Counsel for Defendant:

I'm saying that that establishes a prima facie case...

BY THE COURT:

All right. Look, let's get practical over here. How do you want the court to select a foreman from now on If you win your argument.

BY MR. HEARIN, Counsel for Defendant:

I would leave that up to the court, Your Honor.

BY THE COURT:

Well, of course you would. That's a good way to dump it off. The court would have to - you know what you are saying. You are saying regardless, regardless of anything, you do admit that you are not attacking this grand jury as not being fair. RIGHT? You said you weren't. But, you are telling me I have to figure out a way because of the percentages, that I have to figure out a way of appointing black people, ladies or men, to the grand jury. So, I want to know how will I do it? Every other time, one out of three, one out of four, two to-one. All the time.

BY MR. HEARIN, Counsel for Defendant:

No, I don't think it would be done on a statistical basis like that.

BY THE COURT:

If that is so then why did you figure out all those percentages and why did the Supreme Court in Sabine Parish figure out all the percentages?

BY MR. HEARIN, Counsel for Defendant:

Because once it is shown the Supreme Court wants a racially neutral selection procedure. Not necessarily numerical to be designed. It points out a possible problem in the system and...

BY THE COURT:

Let me make my point clearer. Sabine Parish is between 14 and 16. Evangeline has just about 24. How many black - in a ten year period how many black foreman would you have to have in Sabine Parish and how many black would you have to have in Evangeline Parish. Evangeline Parish is about 10% more.

BY MR. HEARIN, Counsel for Defendant:

Well, would probably have to have an actual disparity between the population of something less than 14.6%.

BY THE COURT:

I'm just pointing out to you the difficulty that the court would have - that the court may have. You understand? Okay. Proceed. You are making a very good argument and you must not believe that I'm picking at you. I think you wrote a real good brief and I think your argument is very, very persuasive and I think you are handling it very well.

BY MR. HEARIN, Counsel for Defendant:

I'm not concerned about you picking at me, Your Honor.

BY THE COURT:

That's good.

BY MR. HEARIN:, Counsel for Defendant:

I think simply the way the law is set up, and I'll

conclude on this note, is that the statistical analysis makes the court look at it in an evidentiary hearing. If the state cannot overcome that then it is time to look and see why those numbers came up.

BY THE COURT:

That's - okay - we're right back where we started from. You want me to hold an evidentiary hearing?

BY MR. HEARN, Counsel for Defendant:

I would submit that we have carried our burden to show a prima facie case.

BY THE COURT:

I've asked you this question and I - there's one that you haven't satisfactorily answered. What kind of evidentiary hearing would we have. The District Attorney has already agreed that all of your figures, and your statistics, and your things that you appended to your motion are correct. So, what would you want? You would want him to bring the other judges, that we hear all these judges that are still alive and ask them how them pick juries. I tell you what they would say. They would say that they selected the foreman. That's what they would tell you.

BY MR. HEARN, Counsel for Defendant:

That's true. But, the D.A. would have the opportunity to show that that despite the numbers they came up by chance. It is conceivable possible.

BY THE COURT:

But not when you say they are all white. I mean, I don't think there is anybody in this courtroom that disputes the fact that there has never been a black grand jury foreperson in this parish. So, what kind of evidence would

Mr. Vidrine put on?

BY MR. HEARN, Counsel for Defendant:

He would have to put on evidence of objectively neutral procedures that have been practiced during that time span and that they were practiced and yet we still had 35 in a row. That would be his burden and it is a big burden I admit.

BY THE COURT:

Not a big one an impossible one. Okay. You're doing good. You want Richard to argue now and then you want to refute what he is going to say?

BY MR. HEARN; Counsel for Defendant:

That would be fine. I would close by saying I do believe that we have carried the burden on the prima facie case at this time.

BY THE COURT:

All right. This is what I'm going to do. I'm going to let Mr. Vidrine argue and then I'm going to let you come back and refute what he says. Mr. Vidrine. Look, I don't want to tell you how to argue and but I'm interested primarily in this standing to claim. I think it is two things. I think it is denial of equal protection of laws and due process. That is how I see it. And, I would like to know whether or not since Campbell is white he has a standing to ...

BY MR. VIDRINE, Assistant District Attorney:

Our position, Your Honor, is very simple. In this particular case...

BY THE COURT:

Yes, in this particular case. Well have to take one at

a time.

BY MR. VIDRINE, Assistant District Attorney:

Yes, sir. In this particular case and we're not conceding about any other case or any other scenario or any other...

BY THE COURT:

No, no, this is the case sub judice. Okay.

BY MR. VIDRINE, Assistant District Attorney:

We have a white defendant, we have a white grand jury foreman.

BY THE COURT:

And you have a white victim.

BY MR. VIDRINE, Assistant District Attorney:

And we have a white victim. We suggest to the court that he, Terry Campbell, does not have standing in this court. The defendant's group in order for him to seek relief he has to show that the defendant's group is one that is a recognizable distinct class singled out for different treatment. He can't show that. He has not shown that.

BY THE COURT:

Because he is white.

BY MR. VIDRINE, Assistant District Attorney:

Because he is white he has no standing. If he were not white, if he were black, perhaps we would have a different situation.

BY THE COURT:

Or perhaps Chinese, or Asian or Hispanic or

something like that. Okay.

BY MR. VIDRINE, Assistant District Attorney:

But that is our situation. He does not have standing because he is white and he just doesn't have standing.

BY THE COURT:

All right. Now, listen. Let me ask you something. What if I find standing what do you say about that?

BY MR. VIDRINE, Assistant District Attorney:

Well, Your Honor, if you find standing and if vou find that there is a substantial degree of under representation when comparing the proportion of the group and the total population to the proportion...

BY THE COURT:

This is what I know, Mr. Vidrine, and you know it and we all know it. We know that we have nearly 24% of our people in this parish who are black people.

BY MR. VIDRINE, Assistant District Attorney:

Correct.

BY THE COURT:

We know that. We also know that there has never been a black foreperson on the grand jury. We know that. We have had black foremen on petit juries and we've had them in civil juries, but you have not had them on grand juries. We also know that Campbell is white. We know that the foreperson who sat in on the grand jury was white. And, we know that the victim, Mr. Sharp, was white. Now, those are things that we know and we have to accept. We know the percentages and we know everything. Okay. I think that the standing is the big issue.

BY MR. VIDRINE, Assistant District Attorney:

So do I.

BY THE COURT:

Okay. if you have finished. Now, Mr. Hearn, I'm a firm believer that each lawyer is the architect of his own case. I only suggest, you understand, I don't tell you what to do. But, I think if you want to refute this you should refute the standing argument first.

BY MR. HEARN, Counsel for Defendant:

Yes, Your Honor. According to that rational we could pick all white grand juries and white people would have no standing to assert that, you know, that the selection process was wrong. I mean, if only a white and besides we're missing the boat on that the white defendant is asserting the right of the excluded blacks. That's the rational of the equal protection claims.

BY THE COURT:

But look at how this thing is impossible though. Supposing Mr. Campbell was black. Could Mr. Campbell argue that he wants a white foreman?

BY MR. HEARN, Counsel for Defendant:

Certainly if there was a discriminatory record over the years that the selection process is tainted. I would also submit that if the selection process is substantially defective for any reason, race or otherwise, any action that the grand jury takes against black, white or any male or females, true bill or no true bill is per se substantially defective on it's face.

BY THE COURT:

Okay. Now you see you are saying male and female.

All right. Supposing that Mr. Campbell was a woman, and Mr. Campbell would say, all right, I went check all the records. Mr. Hearin went and checked all the records. There has never been a female grand jury forelady, foreperson, in Evangeline Parish. Would we be arguing the same think today?

BY MR. HEARN, Counsel for Defendant:

There could be an argument made.

BY THE COURT:

Yes, because the thing says regardless of sex, nationality...

BY MR. HEARN, Counsel for Defendant:

Although that is not true there have been female grand jury foremen.

BY THE COURT:

It was a hypothet really, you know. I didn't mean to mislead you. I meant it as a hypothet. We could take the Parish of Utopia and say look there has never been a female foreperson. So, I'm a female defendant and I want the indictment quashed because there has never been a female on the grand jury as a foreman.

BY MR. HEARN, Counsel for Defendant:

Once again, Your Honor, I don't think it would necessarily matter other than clearly the Supreme Court has extended him the racial discrimination context of third party standing. Now, whether that would go to gender or not maybe an issue at that hearing which would be difference from ours. I submit that there is clear law out in the racial discriminatory context because of the history of it that gives third party standing to those who are excluded and the defendant,

regardless of his race, can raise it for the good of society as a whole, so that our grand juries and our trial juries are not selected in a discriminatory fashion so it doesn't diminish the public's faith in our judicial system is the basic rational in Rhodes versus Mitchell and the cases I've cited in my memorandum.

BY THE COURT:

Okay. I guess we've just about beat a dog to death over here. But - go ahead.

BY MR. HEARN, Counsel for Defendant:

Let me add that I have not seen in the standing analysis that I have read any reference to the practical difficulties as to the remedy as to why the person does or does not have standing.

BY THE COURT:

Okay. And before I let you sit down. You think this is only an equal protection problem or it is also a due process problem.

BY MR. HEARN, Counsel for Defendant:

I think the defendant has equal protection claims, due process claims and fair cross section claims.

BY THE COURT:

I agree with you. That's the problem. I agree with you. Okay.

BY MR. HEARN, Counsel for Defendant:

Can I add one thing, Your Honor.

BY THE COURT:

Certainly. In this court time is of no moment.

BY MR. HEARN, Counsel for Defendant:

As to the fair cross section I would simply, which is in my memorandum, Rule 25 of the Supreme Court which shows the court's allegiance to the fair cross section requirement.

BY THE COURT:

Okay. Mr. Vidrine do you have anything?

BY MR. VIDRINE, Assistant District Attorney:

The only thing I would add, Your Honor, in the case of U. S. Supreme Court case of Castanetta versus Fortita, 430 U.S. 482, where it sets out the three prong test. In that case it shows that once the defendant has shown substantial under representation of his group.

BY THE COURT:

Yes, but that's after you find standing.

BY MR. VIDRINE, Assistant District Attorney:

To find standing.

BY THE COURT:

Yes, so they dovetail together. Okay. Gentlemen, Im going to rule. Now, in the event that this is transcribed it is going to constitute this court's written reasons for judgment on this Motion to Quash the Grand Jury Indictment. Of paramount importance to the court here is whether or not the Defendant Campbell has standing to raise the issue of equal protection and/or due process in the grand jury foreperson selection contest in the 13th Judicial District, Evangeline Parish, Louisiana. Should this court rule that he lacks this standing the court will need go no further and the Defendant Campbell's Motion to Quash the Grand Jury indictment will be denied. In this case it is undisputed that both the

Defendant Campbell and the dead victim Sharp are white men. It is also undisputed that the foreperson who sat on this grand jury, was a white man. Therefore, the real burning issue before this court is how does the exclusion of negroes from the position of grand jury foreperson violate Defendant Campbell, a white man's constitutional equal protection and/or due process rights. I remind you, all of you, that I am only dealing with the case sub judice, the case before me today. Gentlemen, how can the exclusion of negroes from the position of grand jury foreperson, keeping in mind that the grand jury is an accusatory body. How can that impair the confidence of Defendant Campbell, a white man, in the administration of criminal justice. How can Defendant Campbell, who approached the court for selecting a foreperson of his own race to a grand jury that has accused him of killing white man another member of his own race. How can such a procedure cast a doubt upon the integrity of the judicial process. How, can Defendant Campbell, a white man, be prejudiced by the court appointing a foreperson who is also a white man. Is Defendant Campbell prejudiced because the grand jury foreperson was a white man? How can such a procedure place the fairness of a criminal proceeding in doubt. How can Defendant Campbell, a white man, complain that the foreperson, another white man, who sat on the grand jury that indicted him was tainted. And, as far as that goes all the other white forepersons who sat on the Evangeline Parish grand juries in the past at least from 1;76 to present, were tainted. How can Defendant Campbell argue that he was racially discriminated against. This Court answers all the above questions in the negative. There is no claim here that the grand jury that indicted Defendant Campbell was one that was selected at random and from a fair cross section of Evangeline Parish, the 13th Judicial District. There is no claim that that wasn't how it was. There is no claim that the members of the grand jury who indicted him were excluded

on the count of race, color, religion, sex, national origin or economic status. And, there is on the books, the United States Supreme Court decision of Hobby versus United States, 468 US 339, 7045 Supreme Court 3993 (19984), which holds that the discrimination in the selection of a federal grand jury foreperson does not constitute a violation of due process. Hobby was a white man seeking relief under the due process clause of the Fifth Amendment. Just as Defendant Campbell is doing here under the equal protection clause, but by admission of counsel also under the due process clause.

The court holds that in the case subjudice there is no racial discrimination in the process used in Evangeline Parish, Louisiana against the Defendant Campbell. Again I'm restricting all of my comments to this one particular case that we're here on this morning.

This court rules that the Defendant Campbell, being a white man accused of killing another white man, Mr. Sharp, was not denied equal protection of the laws and/or due process because of the grand jury foreperson selection process in the past up to the present, where all of the forepersons were white. Therefore, Defendant Campbell has no standing to raise that issue. That being the case the court need not consider the other issues. The Motion to Quash the Indictment is denied. Mr. Vidrine, you will prepare a judgment to that effect and submit it to me for signature hopefully while Mr. Hearin and Mr. Small are still here during the day.

BY MR. VIDRINE, Assistant District Attorney:

Yes, sir.

BY THE COURT:

Gentlemen, that is my ruling. Thank you very much.

BY MR. HEARIN:, Counsel for Defendant:

Your Honor, I would like to respectfully object to your ruling and...

BY THE COURT:

Certainly.

BY MR. HEARIN:, Counsel for Defendant:

... and seek a delay for seeking writs.

BY THE COURT:

You have a perfect right to seek writs, but there is going to be no delay and there is going to be no stay order granted. If you want to take writs tell her right now so she can go type it up.

BY MR. HEARIN:, Counsel for Defendants:

We'd like to confer on whether we actually want to take a writ.

BY THE COURT:

You understand that the bird of time is on the wing over here.

BY MR. HEARIN:, Counsel for Defendant:

I understand.

BY THE COURT:

You'll have to tell her if you want just my ruling or if you want all of the colloquy. If you want all of the colloquy it is going to be a much bigger job. If you want only my ruling and then the colloquy is going to be your argument in the brief to the Court of Appeals and/or the Supreme Court - I know you file them with both courts. But, whatever you decide. We're at your disposal and - the only thing I'm

asking you is - her name is Kellie - let Kellie know as soon as you can.

BY MR. HEARIN, Counsel for Defendant:

Yes, sir, Your Honor. I just wanted to protect our right to...

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

VS. *NO.* 95-K- 0824

TERRY CAMPBELL

- - - - - - - -

IN RE: Terry Campbell; Defendant; Applying for Rehearing of this Court's Order dated October 2, 1995; Court of Appeal Third Circuit Number CR94-11401; Parish of Evangeline 13th Judicial District Court Division "A" Number 45,690

- - - - - - - -

November 3, 1995
Rehearing denied.

JCW
PFC
WFM
HTL
CDK
BJJ
JPV

Supreme Court of Louisiana
November 3, 1995

S/ Frans J. Labranche, Jr.
Clerk of Court
For the Court

CRIMINAL DOCKET NO. 45,690-F

Jul 11 153 PM 194

STATE OF LOUISIANA	: 13TH JUDICIAL DISTRICT COURT
VERSUS	: PARISH OF EVANGELINE
TERRY D. CAMPBELL	: STATE OF LOUISIANA

Filed:_____ : _____ _____ Dy Clk

ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1

The trial Court erred in overruling the Motion to Quash Grand Jury Indictment because defendant was charged with a Grand Jury Indictment which was returned by a Grand Jury which was illegally and unconstitutionally selected in that the Grand Jury foreperson selection process in Evangeline Parish was discriminatory and in violation of Louisiana and United States constitutional provisions.

ASSIGNMENT OF ERROR NO. 2

The trial Court erred in ruling on the issue of defendant's present capacity to proceed for the reason that the defendant's mental disease or defect and his lack of capacity to understand the proceedings against him and assist in his defense remained with him throughout the proceedings and exist to this date.

ASSIGNMENT OF ERROR NO. 3

The trial Court erred in overruling defendant's written Motion to Prohibit Two (2) Compelled Psychiatric Examinations by Two (2) Separate Doctors Served on Defendant Less Than One Month Prior to His Second Degree Murder Trial, and in overruling defendant's oral Motion to Limit Expert Witnesses.

ASSIGNMENT OF ERROR NO. 4

The trial Court erred in overruling defendant's written Motion to Suppress Inculpatory Statements and Supplemental Motion to Suppress.

ASSIGNMENT OF ERROR NO. 5

The trial Court erred in ruling during the course of the trial on defendant's oral Motion to Suppress Inculpatory Statements (which was renewed during the course of the trial) and the expanded oral Motion to Suppress Inculpatory Statements (which was made on the grounds that the warrant was issued without probable cause).

ASSIGNMENT OF ERROR NO. 6

The trial Court erred when it refused to give refused to give defense requested jury charges number 2. 3, 4 and 5, all of which requested that negligent homicide be defined and be given to the jury as a responsive verdict which it could consider and return.

ASSIGNMENT OF ERROR NO. 7

The trial Court erred when it refused to give defense

requested jury charge number 7 which was wholly correct and required in order to clarify ambiguity and inaccuracies which existed in the general charge on intent which was given to the jury.

ASSIGNMENT OF ERROR NO. 8

The trial Court erred when it overruled defendant's written objections to the proffered general jury charges which said objections were tendered to the Court timely in a document entitled "Defense Objections to Proffered General Jury Charges." More specifically, the Court's charge defining manslaughter was incomplete and inaccurate and referred to enumerated and non-enumerated felonies in R.S. 14:30 and R.S. 14:30.1 when the Court's general charge did not specify the enumerated or nonenumerated felonies nor did the Court's general charge define the enumerated or nonenumerated felonies. Consequently, the jury did not have a full and fair definition of manslaughter and could not have adequately considered that verdict.

ASSIGNMENT OF ERROR NO. 9

The trial Court erred in failing to sustain defendant's objections to the proffered general jury charges.

ASSIGNMENT OF ERROR NO. 10

The trial Court erred in overruling defendant's Motion for New Trial.

ASSIGNMENT OF ERROR NO. 11

The-trial Court erred in overruling defendant's Motion for Post-Verdict Judgment of Acquittal.

Respectfully Submitted By
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FILED S/5 20- 19 S/94
S/A.F.D. Dy. Clerk

CRIMINAL DOCKET NO. 45,690-F

STATE OF LOUISIANA COURT	:	13TH JUDICIAL DISTRICT
VERSUS	:	PARISH OF EVANGELINE
TERRY D. CAMPBELL	:	STATE OF LOUISIANA
Filed:_____ Dy Clk	:	_____

MOTION FOR NEW TRIAL

NOW INTO COURT comes the defendant, TERRY D. CAMPBELL, through undersigned counsel, and he does, with respect, move a new trial pursuant to Louisiana Code of Criminal Procedure, Article 851 (1), (2) and (5). He affirmatively alleges that injustices have been done to him for which he is entitled to a new trial.

1.

A new trial should be granted to defendant, TERRY D. CAMPBELL, under the provisions of Louisiana Code of Criminal Procedure, Article 851 (1), for the reason that the verdict is contrary to the law and the evidence. More particularly, the evidence does not establish beyond a reasonable doubt that the defendant, TERRY D. CAMPBELL, intended to kill James L. Sharp. Moreover, the evidence does not establish beyond a reasonable doubt that the defendant,

TERRY D. CAMPBELL, intended to inflict great bodily harm upon James L. Sharp.

2.

A new trial should be granted to defendant, TERRY D. CAMPBELL, under the provisions of Louisiana Code of Criminal Procedure, Article 851 (1), for the reason that clearly the preponderance of the evidence establishes the defense of insanity at the time of the offense - that is. that the circumstances indicate that because of a mental disease or defect the defendant, TERRY D. CAMPBELL, was incapable of distinguishing between right and wrong with reference to the conduct in question.

3.

A new trial should be granted to defendant, TERRY D. CAMPBELL, under the provisions of Louisiana Code of Criminal Procedure, Article 851 (2), for the reason that the Court's ruling on a written motion made during the proceedings shows prejudicial error in that the Court overruled the defendant's Motion to Quash Grand Jury Indictment. More particularly, defendant, TERRY D. CAMPBELL, was charged by a grand jury indictment which was returned by a grand jury which was illegally and unconstitutionally selected in that the grand jury foreperson selection process in Evangeline Parish is discriminatory and violates the Sixth and Fourteenth Amendments of the United States Constitution, as well as Article 1, Section 2, Article 1, Section 15, and Article 1, Section 16, of the Louisiana Constitution. It is fundamental that a defendant cannot be forced to trial on an indictment handed down by an unconstitutionally constituted grand jury. See *Johnson v. Puckett,* 929 F.2d 106 (5th Cir. 1991).

4.

A new trial should be granted to defendant, TERRY D. CAMPBELL, under the provisions of Louisiana Code of Criminal Procedure, Article 851 (2), for the reason that the Court's ruling on the issue of the defendant's present capacity to proceed is prejudicial error and resulted in an injustice being done to the defendant for the reason that the defendant's mental disease or defect and his lack of capacity to understand the proceedings against him or to assist in his defense remained with him throughout the proceedings and exist to this date. In this connection, the defense urges not only the evidence presented to the Court at the sanity hearings conducted on January 8, 1993 and June 11, 1993, but also the evidence adduced during the course of the trial conducted on May 9, 10, 11, and 12, 1994. The defendant's condition was such that he could not regain his capacity to proceed.

5.

A new trial should be granted to defendant, TERRY D. CAMPBELL, for the reason that Court's ruling on November 12, 1993, which overruled defendant's written Motion to Prohibit Two (2) Compelled Psychiatric Examinations by Two (2) Separate Doctors Served on Defendant Less Than One Month Prior to His Second Degree Murder Trial is prejudicial error which resulted in an injustice being done to the defendant. In additional, the Court's subsequent ruling on November 23, 1993, which overruled defendant's oral Motion for Limiting Expert Witnesses was prejudicial error which resulted in an injustice being done to the defendant, TERRY D. CAMPBELL.

6.

A new trial should be granted to defendant, TERRY D. CAMPBELL, for the reason that Court's ruling on the written Motion to Suppress Inculpatory Statements and Supplemental Motion to Suppress is prejudicial error which resulted in an injustice being done to the defendant. In addition to the prejudicial error which the defendant suffered as a result of the ruling which the Court made on December 2, 1993, on the written Motion to Suppress Inculpatory Statements and Supplemental Motion to Suppress, the defendant, TERRY D. CAMPBELL, had an injustice done to him as a result of the rulings the Court made during the course of the trial on the oral Motion to Suppress Inculpatory Statements (which was renewed during the course of the trial) and the expanded oral Motion to Suppress Inculpatory Statements (which was made on the grounds that the warrant was issued without probable cause). In this connection, the defense urges not only the testimony and exhibits presented to the Court on December 2, 1993, at the hearing on the Motion to Suppress Inculpatory Statements and Supplemental Motion to Suppress, but also the testimony of L. C. Deshotel and Jack Aucoin given on January 11, 1994, during the first trial, as well as the testimony of L. C. Deshotel and Jack Aucoin given on May 10, 1994, during the second trial, and the testimony of Dr. Donald C. Harper, Dr. Jimmy Cole, Dr. William Cloyd, Dr. Lyle LeCorgne, Dr. Paul Ware, Dr. Richard L. Gibson, Dr. Jay C. Pennington, Dr. Phillip Landry and Dr. Charles Fontenot given on May 11 and 12, 1994. Among other things, the cumulative effect of this testimony shows that the defendant, TERRY D. CAMPBELL, could not have understood, remembered, and waived his constitutional rights at the time the statements were alleged to have been given.

7.

A new trial should be granted for the reason that the Court refused to give defense requested jury charges number 2, 3, 4 and 5, all of which requested that negligent homicide be defined and be given to the jury as a responsive verdict which it could consider and return.

8.

A new trial should be granted for the reason that Court refused to give defense requested jury charge number 7 which was wholly correct and required in order to clarify ambiguity and inaccuracies which existed in the general charge on intent which was given to the jury.

9.

A new trial should be granted for the reason that Court overruled the defendant's written objections to the proper general jury charges which said objections were tendered to the Court timely in a document entitled "Defense Objections to Proffered General Jury Charges." More specifically, the Court's charge defining manslaughter was incomplete and inaccurate and referred to enumerated and non-enumerated felonies in R.S. 14:30 and R.S. 14:30.1 when the Court's general charge did not specify the enumerated or non-enumerated felonies nor did the Court's general charge define the enumerated or non-enumerated felonies. Consequently, the jury did not have a full and fair definition of manslaughter and could not have adequately considered that verdict.

10.

A new trial should be granted for the reason that Court

declined to sustain defense objections to the proffered general jury charges and declined to remove from the general charges the following language, to-wit:

A) At page 6 of the proffered general jury charges:

> "Specific intent or premeditation may be implied from certain acts; for example, when it is established that an accused laid in wait for his (or her) alleged victim; when an accused made previous threats against the deceased; when there existed between the defendant and the deceased former grudges; when a accused arms himself (or herself) beforehand, or from any other facts observable by the senses, which show a previously planned scheme to commit a crime.
>
> Specific intent, or premeditation, may also be implied when there are no external signs of it beyond the mere fact of the killing; for instance, when there was no lawful reason for it; and when the killing is without provocation, or upon so slight provocation as to not justify it."

B) At page 7 of the proffered general jury charges:

" . . . either Article 30 (first degree murder), or..."

C) At page 7 of the proffered general jury charges:

> "(2) A homicide committed, without any intent to cause death or great bodily harm:

(a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Articles 30 and 30.1, or of any intentional misdemeanor directly affecting the person; or

(b) When the offender is resisting lawful arrest by means, or in a manner, not inherently dangerous, and the circumstances are such that the killing would not be murder under Articles 30 or 30.1.

It will be noted that the article just read to you states that 'Manslaughter is (1) a homicide which would be murder under Subdivision (1) of Article 30.1 (Second Degree Murder). but the offense is committed in sudden passion', etc."

D) At page 8 of the proffered general jury charges:

"Next, the manslaughter article makes it a crime to kill a person unlawfully, even though the accused did not intend to cause death or great bodily harm, if the accused as the time he (or she) delivered the fatal blow, was engaged in the perpetration or attempted perpetration of any intentional misdemeanor directly affecting the person."

E) At page 10 of the proffered general jury charges:

"if you find that the defendant established by a preponderance of the evidence the defense of insanity at the time of the

> offense, then your verdict should be 'We, the Jury, find the defendant not guilty by Reason of Insanity'."

11.

A new trial should be granted under the provisions of Louisiana Code of Criminal Procedure, Article 851 (5), which provides:

> "... The court, on motion of the defendant, shall grant a new trial whenever:
>
> . . .
>
> (5) The court is of the opinion that the ends of justice would be served by the granting a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right."

It is obvious for the reasons urged above, among others, that the ends of justice would be served by granting the defendant, TERRY D. CAMPBELL, a new trial. The various rulings indicated above show that injustices have been done to the defendant which constitute prejudicial error and the jury which returned the verdict did not properly apply the law with respect to present insanity and failed to implement R.S. 14:14, and Louisiana Code of Criminal Procedure, Article 652, which, respectively, provides:

> "If the circumstances indicate that because of a mental disease or defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in

question, the offender shall be exempt from criminal responsibility." R.S. 14:14.

"The defendant has the burden of establishing the defense of insanity at the time of the offense by a preponderance of the evidence." C.Cr.P. Art. 652.

WHEREFORE, IT IS PRAYED that after a contradictory hearing with the District Attorney or Assistant District Attorney representing the State of Louisiana in the Thirteenth Judicial District, that judgment be rendered herein granting the defendant, TERRY D. CAMPBELL, a new trial in accordance with law.

Respectfully Submitted By
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CRIMINAL DOCKET NUMBER 45,690

13TH JUDICIAL DISTRICT COURT,
PARISH OF EVANGELINE
Dec 1 956 AM '93
STATE OF LOUISIANA

STATE OF LOUISIANA

VERSUS

TERRY D. CAMPBELL

FILED: S/12-1-93 : S/Tina C. Fontenot DY. CLK.

MOTION TO QUASH GRAND JURY INDICTMENT

TO THE HONORABLE, THIRTEENTH JUDICIAL DISTRICT COURT, PARISH OF EVANGELINE, STATE OF LOUISIANA:

NOW INTO COURT, through undersigned counsel comes the defendant/mover TERRY D. CAMPBELL, and for purposes of this motion respectfully represents that:

1.

Defendant is charged by grand jury indictment with the offense of second degree murder. His trial is scheduled to commence in Ville Platte, Louisiana on Monday, December 6, 1993.

2.

Defendant/mover was indicted on February 4, 1992 and his arraignment was on March 6, 1992.

3.

On June 1, 1992 defendant filed a Motion to Change Plea of Not Guilty to Not Guilty and Not Guilty by Reason of Insanity, This motion was granted on July 10, 1992 by the Honorable Preston N. Aucoin.

4.

Defendant now moves to quash the indictment against him and request that this prosecution be dismissed for the following reasons, to wit:

5.

Defendant shows that the indictment against him is defective in that the manner of selection of the grand jury was illegal. La.C.Cr.P., art. 533(l). More specifically, defendant/mover avers that the grand jury foreperson selection process in Evangeline Parish is discriminatory and violates the Sixth and the Fourteenth Amendment to the United States Constitution as well as Article I, section 2, Article I, Section 15 and Article I, Section 16, of the Louisiana Constitution.

6.

It is fundamental that defendant cannot be forced to go to trial on an indictment handed down by an unconstitutionally constituted grand jury. Johnson B. Puckett, 929 F.2d 1067 (5th Cir. 1991).

WHEREFORE, defendant prays that this Motion to Quash be heard; and thereafter the Motion to Quash be granted and the prosecution hearin be dismissed; and for full, general and equitable relief.

Respectfully submitted,

BY: S/Jesse Hearin

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Supreme Court, U.S.
FILED
APR 4 1996
CLERK

No. 95-1240

In The
Supreme Court Of The United States
October Term, 1995

TERRY CAMPBELL,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari
To The Louisiana Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondent

QUESTION PRESENTED

Whether a white defendant has standing under *Rose v. Mitchell*, 443 U.S. 545 (1979), to bring an equal protection claim based upon the exclusion of blacks from service as state grand jury foremen?

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No. 95-1240

In The

Supreme Court Of The United States

October Term, 1995

TERRY CAMPBELL,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari

To The Louisiana Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner Terry Campbell, a white male, was indicted by the Grand Jury of the Thirteenth Judicial District, Parish of Evangeline, State of Louisiana, on February 4, 1992, in which petitioner was charged and subsequently convicted in Docket No. 45,690-F of the second degree murder of James L. Sharp, also a white male, in violation of La. R.S. 14:30.1. *See Petition*

For A Writ Of Certiorari at Appendixes, E-8, E-30, and E-35 through E-37 (hereinafter Pet. at App., at ___), and *Appendixes* herein attached at 3a (hereinafter App. at ____).

Prior to trial, petitioner, through defense counsel Jesse B. Hearin, filed a *Motion To Quash Grand Jury Indictment* in the trial court, alleging that the indictment was defective because "the grand jury foreperson selection process in Evangeline Parish is discriminatory and violates the Sixth and the Fourteenth Amendment to the United States Constitution as well as Article I, Section 2, Article 1, Section 15 and Article I, Section 16, of the Louisiana Constitution." See *Pet. at App.*, I-2. Following a hearing on the motion before the Honorable Preston N. Aucoin, Judge, Thirteenth Judicial District, presiding, on December 2, 1993, the motion was orally denied; subsequently the trial court issued a written judgment on December 6, 1993, confirming the denial of the motion to quash. *See Pet. at App.*, E-1 through E-39, and D-1 through D-2.

Following a 12-person jury trial, petitioner was convicted as charged on May 12, 1994. In a *Motion For New Trial* filed in the trial court by defense counsel Richard V. Burnes and Raymond J. LeJeune, petitioner again claimed his previously denied motion to quash was meritorious because petitioner had been "charged by a grand jury indictment which was returned by a grand jury which was illegally and unconstitutionally selected in that the grand jury foreperson selection process in Evangeline Parish is discriminatory and violates the Sixth and Fourteenth Amendments of the United States Constitution, as well as Article I, Section 2, Article 1, Section 15, and Article 1, Section 16, of the Louisiana Constitution," and thereby requested a new trial on this basis, *inter alia*. *See Pet. at App.*, H-2, H-1 through H-9. Following a contradictory hearing on May 20, 1994, the motion for new trial was subsequently denied; petitioner was thereby sentenced to the mandatory sentence of

life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. *See Pet. at App.*, C-1 through C-8 and La. R.S. 14:30.1.

During appeal to the Louisiana Court of Appeal, Third Circuit, through defense counsel, Mr. Burnes and Mr. LeJeune, petitioner again asserted as Assignment of Error No. 1 the trial court's denial of the motion to quash because the petitioner's indictment "was returned by a Grand Jury which was illegally and unconstitutionally selected in that the Grand Jury foreperson selection process in Evangeline Parish was discriminatory and in violation of Louisiana and United States constitutional provisions". Also alleged as Assignment of Error No. 10 on appeal was the trial court's denial of the motion for new trial; however, petitioner did not distinguish, from among the 11 reasons previously cited to the trial court, the underlying basis for Assignment of Error No. 10. In the original motion for new trial filed with the trial court, one reason, *inter alia*, for relief was based upon an allegation of racial discrimination in the selection of grand jury foremen in Evangeline Parish. *See Pet. at App.*, G-1 and G-3, G-1 through G-4, and H-1 through H-9.

In *State of Louisiana v. Terry Campbell*, 651 So. 2d 412 (La. Ct. App. 3d Cir. 1995), the Louisiana Court of Appeal, Third Circuit, on March 1, 1995, in addressing petitioner's first assignment of error in Docket No. CR-94-1140, reversed the trial court's finding that petitioner, a white male, lacked standing to allege racial discrimination against blacks in the grand jury foreman selection process of Evangeline Parish. *See Id.*, 651 So. 2d at 413-414 and *Pet. at App.*, B-1 through B-5. The Third Circuit remanded the proceedings back to the trial court for further review of the petitioner's racial discrimination claim based upon due process and equal protection. *See Id.* Given the action by the Third Circuit, that reviewing court did not reach the other assignments of error. *See Id.* and *Pet. at App.*, B-5.

On March 31, 1995, the District Attorney for the Thirteenth Judicial District filed an application for writ of certiorari and review with the Louisiana Supreme Court; in an opinion issued on October 2, 1995, the Louisiana Supreme Court in *State of Louisiana v. Terry Campbell*, 661 So. 2d 1321 (La. 1995), granted the State's writ application in Docket No. 95-K-0824, and subsequently reversed the prior ruling by the Louisiana Court of Appeal, Third Circuit, in *State of Louisiana v. Terry Campbell*, 651 So. 2d 412 (La. Ct. App. 3d Cir. 1995), holding that petitioner lacked standing under both the equal protection clause and the due process clause to bring a claim of racial discrimination in the selection of grand jury foremen under *Rose v. Mitchell*, 443 U.S. 545 (1979) and *Hobby v. United States*, 468 U.S. 339 (1984). *See also Pet. at App.*, A-1 through A-2, and A-3 through A-10. The Louisiana Supreme Court also remanded the case back to the Louisiana Court of Appeal, Third Circuit, for consideration of petitioner's remaining assignments of error. A petition for rehearing with the Louisiana Supreme Court was subsequently denied on November 3, 1995. *See State of Louisiana v. Terry Campbell*, 661 So. 2d 1374 (La. 1995), *petition for cert. filed*, 64 U.S.L.W. 3535 (Jan. 31, 1996)(No. 95-1240), and *Pet. at App.*, F-1.

On January 31, 1996, petitioner filed the instant *Petition For A Writ Of Certiorari* with this Honorable Court. Pursuant to *Rules of the Supreme Court of the United States* (effective October 2, 1995), petitioner, through defense counsel Mr. Richard V. Burnes and Dmitrc I. Burnes, notified Honorable J. William Pucheu, District Attorney, Thirteenth Judicial District, Parish of Evangeline, Honorable Richard W. Vidrine, Assistant District Attorney, Thirteenth Judicial District, Parish of Evangeline, and Honorable Richard P. Ieyoub, Attorney General, Louisiana Department of Justice, of the instant petition, and that pursuant to Sup. Ct. R. 15.3 (1995), a brief in opposition to the petition for certiorari would be due March 6, 1996.

Pursuant to a request for assistance by District Attorney J. William Pucheu, the Attorney General is filing the instant *Respondent's Brief In Opposition To Petition For Writ Of Certiorari*. In a letter sent by Federal Express to this Honorable Court on February 23, 1996, the State of Louisiana respectfully requested an extension of time upon which to file the brief in opposition. *See App.* at 4a, 5a. Defense counsel Dmitrc I. Burnes responded in a letter dated February 26, 1996, that defense counsel had no opposition to the requested extension of time. *See App.* at 6a. In a letter dated March 4, 1996, this Honorable Court informed the State of Louisiana that the extension of time within which to file a response to the petition for a writ of certiorari was granted, and that the brief was now due on or before April 5, 1996. *See App.* at 7a.

Subsequent to the filing of the instant petition, the Louisiana Court of Appeal, Third Circuit, has denied relief on petitioner's remaining assignments of error, and affirmed petitioner's conviction and sentence, with the exception of a remand to the trial court to amend the court minutes to reflect that the petitioner is entitled to credit for time served. *See State of Louisiana v. Terry Campbell*, No. 94-1140, slip op. (La. Ct. App. 3d Cir., 3/13/96), ____ So. 2d _____, 1996 WESTLAW 109052 (La. Ct. App. 3d Cir., 3/13/96). Under La.Ct. App. R. 2-18.1 (1995), petitioner had 14 days to petition the Louisiana Court of Appeal, Third Circuit for a rehearing, or if no rehearing is requested, under La.Sup. Ct. R. 10, § 5 (1995), petitioner had 30 days from March 13, 1996, to file an application for writ of certiorari and review with the Louisiana Supreme Court, before the judgment is final in state court. Petitioner filed a petition for rehearing with the Louisiana Court of Appeal, Third Circuit, on Friday, March 29, 1996.

SUMMARY OF THE ARGUMENT

In opposing the petitioner's application for writ of certiorari, the State of Louisiana argues that because the matter is still pending in state courts upon questions of federal law, this Honorable Court lacks jurisdiction under 28 U.S.C. § 1257 to exercise this Court's supervisory jurisdiction. Further, the State of Louisiana contends that Louisiana Supreme Court's decision in *State v. Campbell*, 661 So. 2d 1321 (La. 1995), is consistent with prior decisions of this Honorable Court. Additionally, any conflict between the *Campbell* decision and decisions of the Eleventh Circuit of the United States Court of Appeals is clearly explained by the fact that those federal decisions cited by the petitioner herein pre-dated this Court's decision in *Hobby v. United States*, 468 U.S. 339 (1984), and their validity today is highly questionable. Further, any conflict between the Fifth Circuit of the United States Court of Appeals in *United States v. Cronn*, 717 F. 2d 164 (5th Cir. 1983) and those decisions of the Eleventh Circuit are equally explainable in that the latter should not carry much weight, again in light of the *Hobby* decision. Finally, if this Honorable Court decides supervisory review is necessary, the State of Louisiana would respectfully argue that such review should be limited to the only federal question properly before this Court, i.e., whether a white defendant has standing under *Rose v. Mitchell*, 443 U.S. 545 (1979) to bring a claim under the equal protection clause that blacks have been excluded from service as state grand jury foremen.

ARGUMENT

I. Given that petitioner's case may still be subject to further judicial review in state court on possible federal questions of law, petition for writ of certiorari should be dismissed for want of jurisdiction.

In granting a petition for writ of certiorari, this Honorable Court is limited by 28 U.S.C. § 1257 to review *"[f]inal judgments or decrees* rendered by the highest court of a State in which a decision could be had..." (emphasis added). *See also Pet.* at 3. In the instant case, the Louisiana Supreme Court, while admittedly denying an issue of federal law concerning one assignment of error, remanded the matter back to the Louisiana Court of Appeal, Third Circuit, for consideration of petitioner's remaining assignments of error. *See State of Louisiana v. Campbell*, 661 So. 2d 1321 (La. 1995), *rev'ing, State of Louisiana v. Campbell*, 651 So. 2d 412 (La. Ct. App. 3d Cir. 1995). Pursuant to the Louisiana Supreme Court's mandate, the Louisiana Court of Appeal, Third Circuit, on March 13, 1996, reviewed the remaining nine assignments of error (an additional assignment of error was abandoned as being assigned but not briefed), and affirmed petitioner's conviction and sentence. Petitioner's claims for relief on appeal include both issues of Louisiana and federal law, including but not necessarily limited to, petitioner's Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel. *See State of Louisiana v. Campbell*, No. 94-1140, slip op. (La. Ct. App. 3d Cir., 3/13/96), ____ So. 2d _____, 1996 WESTLAW 109052 (La. Ct. App. 3d Cir., 3/13/96). The instant petition for writ of certiorari was mailed by the petitioner, as pointed out above, on January 31, 1996, forty-two days **before** the March 13, 1996, decision of the Louisiana Court of Appeal, Third Circuit. Moreover, as allowed by La.Ct. App. R. 2-18.1 (1995), petitioner has filed a petition for rehearing with the Louisiana Court of Ap-

peal, Third Circuit. If no rehearing is timely requested, under La.Sup. Ct. R. 10, § 5 (1995), petitioner had 30 days from March 13, 1996, to file an application for writ of certiorari and review with the Louisiana Supreme Court, before the judgment is final in state court. Further, if a rehearing was timely requested but denied, petitioner would have 30 days to seek review from the order denying the rehearing. Finally, if a rehearing is timely requested and granted, the aggrieved party would have 30 days to seek review with the Louisiana Supreme Court from the lower court's judgment on rehearing.

Given the pending status of petitioner's appeal, the State of Louisiana responds that in order to avoid piecemeal litigation on possible federal issues of law involving the same petitioner, this Honorable Court should decline the instant application for petition for writ of certiorari without prejudice until all matters of federal law are resolved by the Louisiana courts. See Robert L. Stern et al., *Supreme Court Practice* at 90 (7th ed. 1993). Clearly the instant judgment in this matter is not final. Because this Honorable Court's supervisory jurisdiction is necessarily limited to final judgments of a state's highest court of last resort where a substantial federal question has been properly raised and necessarily decided upon, the context of the instant litigation necessitates a ruling by this Honorable Court that the matter is not yet ready for review. Clearly the remand of the matter from the Louisiana Supreme Court back to the Louisiana Court of Appeal, Third Circuit, indicated that matters of substance remained unresolved; it is equally clear that what was left unresolved was more detailed than simply a lower court performing a ministerial act, for example where a lower court simply enters a judgment at a higher court's direction. *See Department of Banking, State of Nebraska v. Pink*, 317 U.S. 264, 267 (1942). Moreover, a judgment to this Honorable Court should be final not only as to all parties, but also as to the whole subject matter involving all possible causes of action. See *Collin v. Miller*, 252

U.S. 364, 370 (1920). Most important to the instant case, the remand of a case that leaves open some matter that is not simply ministerial and which might itself create a federal question, means, *ipso facto*, that the judgment is not yet final, and thus, is not yet subject to judicial review by this Honorable Court. *Supreme Court Practice* at 94-95; *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 632-33 (1981); *O'Dell v. Espinoza*, 456 U.S. 430 (1982); and *Pope v. Atlantic Coast Line Rail Co.*, 345 U.S. 379, 382 (1953). *See also North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973)(requiring finality of state court judgments avoids piecemeal review by federal courts of state court decisions.) *Contrast Brady v. Maryland*, 373 U.S. 83, 85 n. 1 (1963)(review granted on federal question because resolution of that issue would decide whether suppression of evidence would require retrial on the merits as well as on the issue of punishment).

Another reason counseling hesitation by this Court to grant review at this juncture is the policy consideration of limiting federal review of state courts' determination of federal constitutional issues as a means to minimize federal intrusion into state affairs. *Supreme Court Practice* at 95. Furthermore, this Court has often recognized and insisted that state courts be allowed the first opportunity to pass upon federal constitutional challenges to state action in the first instance, and that state courts, as their federal counterparts, are equally as competent in adjudicating federal constitutional claims. *Allen v. McCurry*, 449 U.S. 90, 105 (1980)(confidence in state courts to adjudicate federal claims). This Honorable Court had also adopted a policy of allowing state courts the opportunity to correct any possible constitutional violation caused by state action. *Picard v. Connor*, 404 U.S. 270, 277-278 (1971). Most compelling here is that further proceedings pursuant to a remand by a state supreme court to a lower state court to resolve other issues of federal law provides a strong basis by which this

Court should rule that the pending state court judgment is not final, and thus, not reviewable.

Petitioner should be required to establish to this Court's satisfaction why federal review at this juncture is necessary. Petitioner has failed to do so. Allowing a review at this point runs counter to the general rule that only final judgments of a state's highest court of last resort are reviewable by this Honorable Court. *See Flynt v. Ohio*, 451 U.S. 619, 622 (1981)(holding no important federal interests would be eroded if state criminal proceedings went forward following denial of a federal claim of selective and discriminatory prosecution under the equal protection clause.) [1]

Petitioner certainly has failed to establish that a federal question or federal questions raised by the instant petition would be lost **but for** this Court's invoking its supervisory jurisdiction even though no final judgment has yet been rendered.

In *Flynt, supra*, this Honorable Court held that it lacked jurisdiction under 28 U.S.C. § 1257 to review a state Supreme Court ruling, which had rejected a federal claim of *Hustler* publisher Larry Flynt concerning discriminatory prosecution under obscenity laws. Even though the First and Fourteenth amendments to the U.S. Constitution were involved in the de-

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[1] The State of Louisiana has not reproduced the opinion of *State of Louisiana v. Terry Campbell*, No. 94-1140, slip op. (La. Ct. App. 3d Cir., 3/13/96), ____ So. 2d _____, 1996 WESTLAW 109052 (La. Ct. App. 3d Cir., 3/13/96), given the length of the decision, the added costs for printing and reproduction, and the burden on the petitioner to establish why review should be granted. However, the decision is available to this Honorable Court through the Westlaw service, and petitioner has the option to include that decision if he opts to file a reply brief under Sup.Ct.R. 15.6., which is in compliance with Sup.Ct.R. 14.1 (i) (ii), and R. 15.8.

cided federal claim, this Court held that there was no final judgment, and that none of the four exceptions to the general rule that only final judgments are reviewable applied, citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-485 (1975). In *Flynt*, this Court was satisfied that federal review could wait until final judgment without any adverse impact upon important federal interests. Moreover, a state court's decision that an earlier ruling by that court would be deemed law of the case would not affect the supervisory jurisdiction of this Honorable Court to re-examine the earlier state court rulings. *Hathorn v. Lovorn*, 457 U.S. 255, 261-62 (1982)(Supreme Court has jurisdiction to consider all substantial federal questions determined in the stages of earlier state proceedings; whether such a federal claim is untimely under state procedural rules is not generally an independent and adequate state basis upon which further federal review is barred). *See also Whitus v. Georgia*, 385 U.S. 545 (1967)(holding that denial of defendant's claim that grand jury was selected in a discriminatory manner was reviewable after final judgment of conviction, but not after interlocutory appeal permitted under state law). *Contrast California v. Stewart*, 384 U.S. 436 (1966)(state court's reversal of conviction on federal constitutional ground and remand for a new trial did not bar federal review because an acquittal would possibly preclude such review).

The State is cognizant of this Court's decision in *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945), where Mr. Justice Frankfurter, in writing for the Court, acknowledged a "penumbral area" for the general rule that only final judgments are reviewable by this Honorable Court. The State urges that to grant review in the instant petition could possibly result in piecemeal resolution of federal questions of law involving the same petitioner. Mr. Justice Frankfurter wrote: "...Of course, where the remaining litigation may raise other federal questions that may later come here, to allow review of

an intermediary adjudication would offend the decisive objection to fragmentary reviews." *Id.*, 326 U.S. at 127.

For the foregoing reasons, the State of Louisiana respectfully requests the petition for certiorari be dismissed for lack of a final judgment unless the petitioner establishes to this Court's satisfaction why an exception under *Cox Broadcasting Corp., supra*, should apply.

II. Louisiana Supreme Court's decision in *State of Louisiana v. Terry Campbell*, 661 So. 2d 1321 (La. 1995), is consistent with decisions of this Honorable Court.

In the petition for writ of certiorari, petitioner claims that Louisiana Supreme Court's decision is flatly inconsistent with this Honorable Court's decisions in *Peters v. Kiff*, 407 U.S. 493 (1972) and *Powers v. Ohio*, 499 U.S. 400 (1991). *Pet.* at 4. Moreover, petitioner claims that the Louisiana Supreme Court "has decided important questions of federal law that have not been, but should be, settled by this Court." *Ibid.*

The State of Louisiana counters that these claims defy a plain reading of the decisions in question. The Louisiana Supreme Court expressly declined petitioner's invitation to expand *Powers* beyond the context of an equal protection attack to race-based exclusions of prospective petit jurors through the use of peremptory challenges. *State of Louisiana v. Campbell*, 661 So. 2d at 1324. In *Powers* this Honorable Court held that a defendant, regardless of his or her race, had standing under the equal protection clause to object to the race-based exclusion of any prospective petit juror whether or not that defendant and the excluded juror shared the same race.

Moreover, in *Peters v. Kiff, supra*, this Honorable Court held that a white defendant had standing to object on the basis of the due process clause to the racial composition of a grand and petit juries even though the claim centered on allegations that

blacks had been systematically excluded.

Given the fact that this Honorable Court **has not decided** whether a white defendant has standing under *Rose v. Mitchell, supra,* to bring an equal protection challenge to alleged racial discrimination against blacks in the context of a state grand jury foreman, the Louisiana Supreme Court was correct not to extend *Powers* beyond its equal protection holding. This is especially true in light of the Louisiana Supreme Court's *dicta* that "[t]he role of the grand jury foreman in Louisiana appears to be similarly ministerial"[2], which was the same conclusion espoused by this Honorable Court in *Hobby* concerning the role of a federal grand jury foreman. *See State of Louisiana v. Campbell,* 661 So. 2d at 1324; and *Hobby,* 468 U.S. at 344. *See also State of Louisiana ex rel. Williams v. Whitley,* 629 So. 2d 343 (La. 1993)(Marcus, J., dissenting, "[t]he role of the foreman of the grand jury in Louisiana also appears to be ministerial in nature.")

Given the holdings of *Powers* and *Peters,* the Louisiana Supreme Court was without express binding authority from this Honorable Court to grant petitioner the relief he was seeking. Furthermore, the Louisiana Supreme Court's decision is also consistent with *Castaneda v. Partida,* 430 U.S. 482, 494 (1977)(Mexican-American defendant had standing under the equal protection clause to object to the exclusion of Mexican-Americans as state grand jurors) and *Rose v. Mitchell,* 443 U.S. at 565,(black defendants had standing under the equal protection clause to challenge exclusion of blacks as state grand jury foremen)[3] in requiring that petitioner establish under the equal protection clause that the "procedures employed resulted in

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[2] Whether or not the duties of a Louisiana grand jury foreman are ministerial would, in the first instance, be a question of state law best left for resolution by Louisiana courts. *See* La.C.Cr.P. art. 436.

[3] Petitioner misconstrues the *Rose* holding by stating that in *Rose* this Honorable Court "held that racial discrimination in the selection of grand

substantial underrepresentation of his race or of the identifiable group to which he belongs." Accordingly, the Louisiana Supreme Court's decision is consistent with decisions of this Honorable Court. Petitioner's claim otherwise is without merit.

III. A perceived conflict of the Louisiana Supreme Court's decision in *State of Louisiana v. Terry Campbell*, 661 So. 2d 1321 (La. 1995), with *United States v. Sneed*, 729 F. 2d 1333 (11th Cir. 1984), does not, *ipso facto*, mean that petitioner is entitled to this Honorable's supervisory review, especially where the state court decision is consistent with prior Supreme Court decisions.[4]

Petitioner claims that the Louisiana Supreme Court decision in question here conflicts with *United States v. Sneed*, 729 F. 2d 1333 (11th 1984), and thereby, this Court should invoke supervisory review. *Pet.* at 4, 11, and 23. The United States Court

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jury foremen violated the Fourteenth Amendment to the United States Constitution *and requires reversal of a state conviction.*" (Emphasis added.) While it is clear from the *Rose* decision that discrimination against blacks in the selection of grand jury foremen violates the equal protection clause of the Fourteenth Amendment, it is not clear that such discrimination warrants reversal of a subsequent conviction. In *Rose*, this Honorable Court "assumed, without deciding, that invidious discrimination in the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the entire grand jury venire." *Id.*, 443 U.S. at 551 n. 4 (Citations omitted.)

[4] Petitioner cites *Bowen v. Kemp*, 769 F. 2d 672 (11th Cir. 1985) as a federal appeals decision that conflicts both with *State of Louisiana v. Terry Campbell*, 661 So. 2d 1321 (La. 1995) and *United States v. Cronn*, 717 F. 2d 164 (1983). The State of Louisiana fails to comprehend this argument given that in *Bowen*, the issue before the federal court revolved around an equal protection claim concerning the exclusion of women from petit jury service. The instant claim before this Honorable Court deals only with an equal protection claim based upon a state's grand jury foreman selection process. Petitioner has not ever claimed discrimination in the selection processes of either state grand juries

of Appeals, Eleventh Circuit, in *Sneed* did not distinguish between discrimination in the selection of a state grand jury foreman and discrimination in the selection of a state grand jury itself. Rather, the 11th Circuit in *Sneed* dealt only with a federal defendant's claim against the federal grand jury foreman selection process, and subsequently extended holdings of Supreme Court cases dealing with discrimination in the selection of grand juries to consider a claim of discrimination in the selection of grand jury foremen. Moreover, the *Sneed* court was bound by clear precedent in the Eleventh Circuit, *United States v. Holman*, 680 F. 2d 1340 (11th Cir. 1982) and *United States v. Perez-Hernandez*, 672 F. 2d 1380 (11th Cir. 1982). As argued below, all of these federal decisions were issued **prior** to *Hobby v. United States, supra*. Furthermore, there is no indication in *Sneed* that an issue before the court was whether a white defendant could bring a claim of racial exclusion of blacks in a state grand jury foreman selection process. The decision clearly centered upon a federal defendant attacking his federal conviction due to alleged discrimination in the selection of federal grand jury foremen. Most importantly, the Eleventh Circuit today may possibly retreat from this line of prior decisions given this Court's binding precedent in the *Hobby* case. *See Sneed*, 729 F. 2d at 1335 n. 3 (finding federal grand jury foreman to be constitutionally significant). Accordingly, given this Court's decision in *Hobby* on a due process claim concerning federal grand jury foremen, and this Court's decisions under the equal protection clause of *Castaneda* and *Rose*, there is no outstanding conflict that has not been resolved.

The State of Louisiana further contends that a conflict alone is insufficient in and of itself to grant supervisory relief. *See*

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or state petit juries. Accordingly, a federal decision not on point with the instant claim could not possibly create the necessary "conflict" by which this Honorable Court invokes supervisory review pursuant to Sup.Ct. Rule 10.

Ramirez v. California, 476 U.S. 1152 (1986)(J. White, dissenting, joined by J. J. Brennan and Powell), wherein the Supreme Court denied a petition for writ of certiorari despite the opinion of dissenting Justices that a conflict existed between a Fifth Circuit Court of Appeals decision and a California Supreme Court decision, and between the latter decision and a Supreme Court decision. *See also Green Bay Packaging, Inc., v. Adams Extract Company*, 473 U.S. 911 (1985)(J. White, dissenting in the denial of a petition for writ of certiorari because of a conflict between decisions of the Fourth Circuit and Fifth Circuit of the United States Court of Appeals.

Accordingly, petitioner has failed to clearly demonstrate that relief is warranted on the basis that the Louisiana Supreme Court's decision is in direct conflict with Eleventh Circuit decisions.

IV. Any perceived conflict between *United States v. Cronn*, 717 F. 2d 164 (5th Cir. 1983) and other decisions of the United States Court of Appeals, 11th Circuit, disappears when one considers that the latter decisions predated *Hobby v. United States*, 468 U.S. 339 (1984).

Finally, petitioner claims review by this Honorable Court is warranted given that *United States v. Cronn*, 717 F. 2d 164 (5th Cir. 1983) conflicts with the following decisions of the United States Court of Appeals, Eleventh Circuit: *United States v. Perez-Hernandez*, 672 F. 2d 1380 (11th Cir. 1982)(*per curiam*); *United States v. Holman*, 680 F. 2d 1340 (11th Cir. 1982); and *United States v. Sneed*, 729 F. 2d 1333 (11th Cir. 1984.) *Pet.* at 11 and 24.

While these decisions at first glance may appear to be in conflict with *Cronn*, all these decisions cited by the petitioner were issued **without the benefit of *Hobby v. United States*, supra,** and dealt with the issue of a federal grand jury foreman,

not a state grand jury foreman. Accordingly, those same federal courts could decide the same issue differently today given the holding of this Honorable Court in *Hobby*. As such, intervention by this Honorable Court to resolve what the petitioner claims is an apparent conflict is clearly not warranted. An examination of the cited federal case law by the instant petitioner shows that the petitioner's claim of a conflict is clearly illusory.

In *United States v. Perez-Hernandez*, 672 F. 2d 1380 (11th Cir. 1982)*(per curiam)*, decided on April 15, 1982, the 11th Circuit held that a hispanic defendant had standing under the equal protection clause to object to the exclusion of blacks and women from service as federal grand jury foremen. It is also noteworthy that the 11th Circuit in *Perez-Hernandez* also rejected the government's argument that the role of a federal grand jury person is "constitutionally insignificant." *Id.* at 1386. *Contrast Hobby, supra*, decided on July 2, 1984. The 11th Circuit also placed heavy reliance on *Peters v. Kiff, supra*, even though that decision was based upon the due process clause as opposed to the equal protection clause.

In *United States v. Holman*, 680 F. 2d 1340 (11th Cir. 1982), decided on July 22, 1982, the 11th Circuit obviously felt bound by *United States v. Perez-Hernandez, supra*, when it held that a white defendant had standing to complain about the exclusion of blacks and women from service as federal grand jury foremen. That Court stated: "...The panel [in *United States v. Perez-Hernandez*] reached that conclusion [of standing] despite its acknowledgement of prevailing Supreme Court precedent which would appear to deny standing to such a defendant:...In accord with our existing precedent, we find standing on the part of the instant appellants." *Id.*, 680 F. 2d at 1355-1356.

Likewise, *United States v. Sneed*, 729 F. 2d 1333 (11th Cir. 1984), decided on April 16, 1984, cites the binding precedent of *United States v. Holman* and *United States v. Perez-Hernandez* for

its decision.

The State of Louisiana contends that petitioner had plainly failed to establish to this Court any viable conflict in the lower federal circuits. Given the holdings of *Hobby*, *Castenda* and *Rose*, *supra*, the federal cases cited by the petitioner fail to prove a jurisdictional basis by which a petition for writ of certiorari should be granted.

V. If this Honorable Court should invoke its supervisory jurisdiction and review the Louisiana Supreme Court's decision below, such review should be limited to only the equal protection claim.

Petitioner claims that the questions presented for review include three federal bases for relief: the equal protection clause, the due process clause and the fair cross-section requirement of the Sixth Amendment. *Pet.* at i. The State counters that the only possible federal question left unresolved for this Honorable Court is whether a white defendant has standing under *Rose* to bring an equal protection claim based upon the exclusion of blacks from a state's selection process for grand jury foremen.

Petitioner's claim that a white defendant has standing to bring a due process attack is foreclosed by this Court's decision in *Hobby*, *supra*. Considering the Louisiana Supreme Court's *dicta* that a Louisiana grand jury foreman's role is ministerial, petitioner's request for relief squarely runs counter to the *Hobby* decision. For the petitioner to distinguish *Hobby* based upon a claimed difference in the selection of a grand jury foreman in the federal system as opposed to the selection of a grand jury foreman in the Louisiana system, clearly rings hollow when the petitioner himself has deliberately chosen not to attack the Louisiana grand jury venire from which his Louisiana grand jury was chosen. Moreover, the Louisiana

Supreme Court in *State of Louisiana v. Mouton*, 395 So. 2d 1337 (La. 1981), upheld the state statutes governing the selection of grand juries in Orleans Parish, whereby the district judge picks each of the 12 grand jurors from the grand jury venire. In *Mouton*, the Louisiana Supreme Court affirmed that La.C.Cr.P. arts. 412, 413 and 414 and La.R.S. 15:114 did not violate the federal due process or equal protection clauses because the defendant had failed to establish an affirmative showing that the system was discriminatory. In the petitioner's case, applicable Louisiana statutes allow district judges of parishes other than Orleans Parish to chose only the grand jury foreman from the grand jury venire; the remaining 11 grand jurors and two alternates are picked randomly and by lot. In light of *Mouton*, petitioner's claim that allowing a district judge to select the grand jury foreman necessarily taints the grand jury itself has no merit. Moreover, the argument fails to account for the petitioner's own decision to forego an attack on Louisiana's system of selecting the grand jury itself. Accordingly, review on the due process claim should be denied.

Finally, petitioner claims he is entitled to federal review on a fair cross-claim analysis under the Sixth Amendment. The State of Louisiana counters that this federal claim has not been heretofore addressed by the state courts in question. A review of the record herein demonstrates that the state courts did not rule on petitioner's Sixth Amendment fair-cross section claim, given the fact the focus was on petitioner's standing to bring either an equal protection attack or a due process attack upon the grand jury foreman selection process itself. Further, the record before this Court does not demonstrate that the petitioner adequately represented a Sixth Amendment fair-cross claim as an adequate basis for relief before the state courts. Given this Honorable Court's policy considerations that state courts should be given the first opportunity to consider the application of state statutes in light of federal constitutional chal-

lenges, this Court's review on this basis is not warranted. *Supreme Court Practice* at 117.

Moreover, authority which petitioner himself cites to this Honorable Court notes in *dicta* that a grand jury foreman attack is not by its nature subject to the Sixth Amendment's requirement of a fair cross-section. *See Sneed, supra,* 729 F. 2d at 1335 n. 2:"[a]lthough the composition of a grand jury or petit jury venire may be challenged under the sixth amendment's guarantee of a right to be tried by a group drawn from a source representing a fair cross-section of the community,...this requirement does not extend to the office of grand jury foreperson because '[o]ne person alone cannot represent the divergent views, experience, and ideas of the distinct groups which form a community.'" (Citations omitted). Accordingly, this Court's review under the Sixth Amendment fair cross-section is not warranted.

CONCLUSION

Based upon the foregoing reasons, the State of Louisiana would respectfully request that this Honorable Court deny the petitioner's application for writ of certiorari to review the judgment of the Louisiana Supreme Court.

Respectfully submitted,

RICHARD P. IEYOUB
Attorney General

KATHLEEN E. PETERSEN*
Assistant Attorney General

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Counsel for Respondent

* Counsel of Record

APPENDIXES

APPENDIXES

APPENDIX A — Bill of Indictment, *State of Louisiana v. Terry Campbell.*

APPENDIX B — Letter to Clerk William Suter from Kathleen Petersen, Assistant Attorney General.

APPENDIX C — Letter to Kathleen E. Petersen, Assistant Attorney General, from Dmitrc I. Burnes, Esquire.

APPENDIX D — Letter to Kathleen E. Petersen, Assistant Attorney General, from Francis J. Lorson, Chief Deputy Clerk, Supreme Court of the United States.

APPENDIX A

BILL OF INDICTMENT

STATE OF LOUISIANA **PARISH**
OF **OF**
LOUISIANA **EVANGELINE**

45,690F

In the name and by the authority of the State of Louisiana, the Grand Jurors of the State of Louisiana, duly impaneled, sworn, and charged to inquire within and for the body of Evangeline Parish, State aforesaid, upon their oath do present:

That on or about the 11th day of January, 1992, at the Parish of Evangeline, State of Louisiana, TERRY D. CAMPBELL committed second degree murder of James L. Sharp

contrary to the form of the Statute of the State of Louisiana in such cases made and provided in contempt of the authority of said State and against the peace and dignity of the same.

/s/ J. William Pucheu
District Attorney, 13th Judicial
District of Louisiana

APPENDIX B

LETTER TO CLERK SUTER FROM KATHLEEN PETERSEN, ASSISTANT ATTORNEY GENERAL

State of Louisiana
Department of Justice
Criminal Division
Baton Rouge

Richard P. Ieyoub
Attorney General

P. O. Box 94095
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SENT BY FEDERAL EXPRESS

Honorable William Suter
Clerk, Supreme Court of the United States
1 First Street Northeast
Washington, D.C. 20543

RE: No. 95-1240, October Term, 1995
Terry Campbell v. State of Louisiana

Dear Sir:

Pursuant to Rule 30.4, the respondent herewith requests that the time within which to respond to the petition for certiorari be extended 30 days, to and including April 5, 1996. The petition for certiorari was served on and received by respondent, the Honorable J. William Pucheu, District Attorney, Parish of Evangeline, on February 14, 1996, and the brief in opposition is now due, unless extended, on March 6, 1996.

This request is made necessary by the fact that on February 14, 1996, Mr. Pucheu contacted Tim Screen, Director, Louisiana Department of Justice, Office of the Attorney General, Criminal Division, and requested assistance in responding to the petition. Pursuant to that request, Mr. Screen has assigned the undersigned counsel to prepare a brief in

opposition in the above-captioned matter. The undersigned is scheduled to begin trial in *State of Louisiana vs. Catherine A. Doucet*, Docket No. 9-93-1, Parish of East Baton Rouge, 19th Judicial District Court, on three felony counts of theft of $500.00 or more beginning on Monday, February 26, 1996, before the Honorable Bonnie Jackson, Judge, presiding, in Baton Rouge, Louisiana. In order to adequately research legal issues and to review relevant court documents and transcripts, the undersigned hereby requests the extended period herein.

Petitioner's counsel, Dmitrc I. Burnes, contacted this date by telephone, has consented to this request for an extension.

Sincerely yours,

/s/Kathleen E. Petersen
KATHLEEN E. PETERSEN
Assistant Attorney General

Louisiana Department of Justice
Criminal Division
P.O. Box 94095
Baton Rouge, LA 70804-9095
(504) 342-7552

cc/ Mr. Dmitrc I. Burnes, Esq.
Hon. J. William Pucheu, D.A.
Mr. Richard W. Vidrine, Asst. D.A.

APPENDIX C

LETTER TO KATHLEEN E. PETERSEN, ASSISTANT ATTORNEY GENERAL, FROM DMITRC I. BURNES

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Dmitrc Ian Burnes
E. Grey Talley

Street Address:
711 Washington Street
Alexandria, LA 71301-8030

February 26, 1996

SENT VIA FACSIMILE (504) 342-7893
AND BY FIRST CLASS MAIL

Ms. Kathleen E. Petersen
Assistant Attorney General
Louisiana Department of Justice
Criminal Division
Post Office Box 94095
Baton Rouge, LA 70804-9095

Re: *State of Louisiana v. Terry D. Campbell*
Supreme Court of the United States
Docket Number 95-1240

Dear Ms. Petersen:

This letter confirms our telephone conversation of Friday, February 23, 1996, wherein you advised me that you would be handling the Terry Campbell case for the office of the Attorney General. This letter also further confirms my agreement to your request to include a statement of my lack of opposition to your planned request for an extension of time within which to file your response to our *Petition for a Writ of Certiorari* to be filed with the United States Supreme Court.

With best regards, I am

Very truly yours,

/s/Dmitrc I. Burnes
DMITRC I. BURNES

DIB/mal

cc: Mr. Terry Campbell
Mrs. Clara Campbell

APPENDIX D

LETTER TO KATHLEEN E. PETERSEN, ASSISTANT ATTORNEY GENERAL FROM FRANCIS J. LORSON, CHIEF DEPUTY CLERK, SUPREME COURT OF THE UNITED STATES

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543

William K. Suter
Clerk of the Court

Area Code 202
479-3011

March 4, 1996

Kathleen E. Peterson
Assistant Attorney General
P. O. Box 94095
Baton Rouge, LA 70804-9095

Re: *Terry Campbell v. Louisiana*
No. 95-1240

Dear Ms. Peterson:

Your request for an extension of time within which to file a response to the petition for a writ of certiorari in the above-entitled case has been granted; the time has been extended to and including April 5, 1996.

No further request for an extension of time will be entertained by the Clerk.

Very truly yours,

WILLIAM K. SUTER, Clerk
By /s/ Francis J. Lorson
Francis J. Lorson
Chief Deputy Clerk

cc: Richard V. Burnes

Supreme Court, U.S.
FILED
APR 24 1996
CLERK

(3)

No. 95-1240

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

TERRY CAMPBELL,

Petitioner,

v.

STATE OF LOUISIANA

Respondent.

On Petition For Writ of Certiorari
To the Louisiana Supreme Court

REPLY BRIEF

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13pp

QUESTIONS PRESENTED

1. Whether a white defendant has standing to object to the race-based exclusion of grand jury foremen on Equal Protection grounds even if not of the same race as the excluded grand jury foremen?

2. Whether a white defendant has standing to raise the due process claim that the former and current foremen of the grand jury which handed down his indictment had been selected in a pattern demonstrating racial discrimination against blacks in violation of defendant's rights under the Fifth and Fourteenth Amendments to the United States Constitution?

3. Whether a white defendant has standing to raise the fair cross-section claim that the former and current foremen of the grand jury which handed down his indictment had been selected in a pattern demonstrating racial discrimination against blacks in violation of defendant's rights under Fifth, Sixth, and Fourteenth Amendments to the United States Constitution?

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SUPPLEMENTAL STATEMENT OF THE CASE

Respondent's brief supplied this Court with a very thorough review of the procedural history of this case including activity subsequent to the filing of the instant petition. See *Respondent's Brief in Opposition to Petition for Writ of Certiorari* at pages 1-5 (hereinafter *Opp.* at ___). As noted by respondent, the Louisiana Court of Appeal, Third Circuit, denied relief on petitioner's remaining assignments of error, in *State of Louisiana v. Terry Campbell*, 94-1140 (La.App. 3 Cir. 3/13/96); ____ So.2d ____, 1996 WESTLAW 109052 (La. Ct. App. 3d Cir., 3/13/96). Under the Uniform Rules of Louisiana Courts of Appeal, Rule 2-18.2 (A), an application for rehearing must be filed with the clerk on or before 14 days after the rendition of the judgment. And under the Uniform Rules of Louisiana Courts of Appeal, Rule 2-13, filing may be accomplished by delivery or by mail addressed to the clerk. The filing of such papers shall be deemed timely when the papers are mailed on or before the due date. Petitioner mailed a Application for Rehearing to the Louisiana Court of Appeal, Third Circuit, on Wednesday, March 27, 1996. Therefore, although the Application for Rehearing was filed by the Clerk of Court on Friday, March 29, 1996, it was timely.

REPLY ARGUMENT

I.

This Honorable Court reviewed those categories of judgments of a highest state court, which although not a "final judgment or decree" with respect to all issues, were, nevertheless, still "final" for purposes of Supreme Court review in *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328, (1975). The case *sub*

judice most closely falls under the fourth category:

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 482-83, 95 S.Ct. 1029, 1040, 43 L.Ed.2d 328, ____ (1975).

In the instant case, the federal constitutional issues raised in petitioner's Questions Presented have been finally decided by the Louisiana Supreme Court. Further proceedings are pending in which petitioner might prevail on the merits on nonfederal grounds, and on federal grounds which are questions in areas of well settled federal law. (Petitioner has raised questions concerning statements obtained from petitioner in violation of his Fifth Amendment right to remain silent and Sixth Amendment right to counsel. The issues raised concern well settled areas of federal law and their

application to the facts in the case.) Reversal of the Louisiana Supreme Court on the issues raised in the instant petition would preclude further litigation on petitioner's appeal and remaining assignments of error currently before the Louisiana Court of Appeal, Third Circuit, on an Application for Rehearing. In petitioner's case, a refusal by this Honorable Court to review immediately the Louisiana Supreme Court decision would seriously erode the policies behind the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Should Defendant prevail on other issues, the decision by the Louisiana Supreme Court denying white defendants standing to raise constitutional claims concerning race-based discrimination in the selection of grand jury foremen would stand and be binding law in Louisiana, thereby denying rights guaranteed to citizens by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Respondent also argues that this Honorable Court should hesitate to grant review as a result of policy considerations limiting federal review of state courts' determination of federal constitutional issues as a means to minimize federal intrusion into state affairs, and that this Court has often recognized and insisted that state courts be allowed the first opportunity to pass upon federal constitutional challenges to state action in a first instance, and that state courts, as their federal counterparts, are equally as competent in adjudicating federal constitutional claims. See *Opp.* at 9. However, here, the Louisiana Supreme Court has had a first opportunity to pass upon the federal constitutional challenge and has rendered its decision. This is not a case where a petitioner is seeking review before the state court has had an opportunity to speak.

II.

Respondent argues both that the Louisiana Supreme Court's decision is consistent with the decisions of this Honorable Court, and that this Honorable Court has not decided whether a white defendant has standing under *Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979) to bring an equal protection challenge to alleged racial discrimination against blacks in the context of a state grand jury foreman. These two positions are incompatible. Respondent is correct in its later ascertain that this Court has not addressed the issue of whether a white defendant has standing to bring an equal protection challenge in the present context. However, the decision of the Louisiana Supreme Court is in consistent with the policy driving the decisions of this Court in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), and in *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972).

Respondent harrowly reads that *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), to hold that a defendant, regardless of his or her race, has standing under the Equal Protection Clause to object to the race-based exclusion of any prospective petit juror whether or not that defendant and the excluded jurors share the same race. Respondent applies *Powers* to say that the Louisiana Supreme Court was without express by any authority to grant petitioner the relief he was seeking. On the contrary, petitioner applies the policy behind the decision in *Powers* to show that a defendant's race is irrelevant to his standing to bring an equal protection challenge.

Respondent uses a similarly narrow reading of *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), to deny authority to the Louisiana Supreme Court to grant

petitioner's relief. Once again, petitioner shows that *Peters v. Kiff* stands for the proposition that a white defendant has standing to raise due process challenges.

Respondent does concede that "it is clear from the *Rose* decision that discrimination against blacks in the selection of grand jury foremen violates the Equal Protection Clause of the Fourteenth Amendment." See *Opp.* at 14 n. 3.

III.

Respondent argues that there is no conflict between the Louisiana Supreme Court's decision in *State of Louisiana v. Terry Campbell*, 661 So.2d 1321 (La. 1995) with *United States v. Sneed*, 729 F.2d 1333 (11 Cir. 1994) and that *Sneed* is overruled by *Hobby v. United States*, 468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984) (thereby requiring the 11th Circuit to retreat from its line of decisions.) Respondent argues the incompatible positions that "there is no outstanding conflict" and that the present "conflict alone is insufficient in and of itself to grant relief." See *Opp.* at 15. Respondent is correct that this Honorable Court has the prerogative of not hearing a case even when there is a conflict, but one of the missions of this Court is to resolve such conflicts.

IV.

Respondent argues that there is only an apparent contradiction between *United States v. Cronn*, 717 F.2d 164 (5th Cir. 1983), and decisions of the United States Court of Appeals, Eleventh Circuit. See *Opp.* at 16-18. Respondent further argues that the conflicts disappear once this Honorable Court rendered the decision in *Hobby v. United States,* 468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984). However, *Hobby* overruled the proposition that the role of a federal

grand jury foreperson is "constitutionally significant." *Hobby* did not overrule the proposition that if the grand jury foreperson's duties are more than ministerial, discrimination in the selection of grand jury foreperson would provide standing for a criminal defendant's constitutional claims.

V.

Respondent argues that petitioner's claim that a white defendant has standing to bring a due process attack is foreclosed by this Court's decision in *Hobby*. See *Opp.* at 18. In section IV above, respondent argued that cases relating to federal grand jury foremen were inapplicable to respondent's case. Here, respondent is arguing that *Hobby* (a federal grand jury foreman case) is applicable to petitioner's case. These two positions are inconsistent. The holding of *Hobby* is that when: 1) the grand jury foreman is selected from a properly constituted grand jury and 2) the duties of the grand jury foreman are merely ministerial, then race-based discrimination in selection of the grand jury foreman does not give rise to due process claims.

In the case *sub judice* the grand jury foreman is **not** selected from a properly constituted grand jury. In Louisiana, grand jury foremen are selected by methods similar to those used to choose grand jury foremen in Tennessee as explained in *Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979).

Further, respondent argues that petitioner's claim should be dismissed because petitioner did not attack the Louisiana grand jury venire or Louisiana's system of selecting the grand jury itself. See *Opp.* at 18-19. It is true that petitioner does not allege there was discrimination in selection of the grand jury venire. It is true that petitioner does not attack the Louisiana system of selecting the grand jury and grand jury foreman as being facially discriminatory.

Petitioner's argument is that facially neutral statutes were applied in a racially discriminatory manner.

Respondent also dismisses petitioner's claim for review on a fair cross-[section] analysis under the Sixth Amendment. See *Opp.* at 19. The record reveals however, that petitioner has consistently argued that his fair cross-section claim is connected with his due process claim. The Louisiana Supreme Court explicitly denied the petitioner's right to raise constitutional claims based solely on the fact that petitioner is white.

CONCLUSION

For the reasons argued herein, and in the *Petition for a Writ of Certiorari*, petitioner respectfully requests that this Honorable Court grant certiorari and review the judgment of the Louisiana Supreme Court.

Respectfully Submitted,
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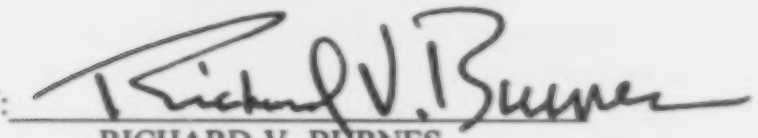
BY: 

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